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NORTH CAROLINA REPORTS.

VOL. 42.

CASES IN EQUITY

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA,

FROM

AUGUST TERM, 1850, TO AUGUST TERM, 1851,
BOTH INCLUSIVE.

By JAMES IREDELL.

Volume VII.

Annotated by WALTER CLARK.

RALEIGH, N. C.:
REPRINTED BY EDWARDS & BROUGHTON.
1897.

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JUDGES

OF THE

SUPREME COURT OF NORTH CAROLINA,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. THOMAS RUFFIN, CHIEF JUSTICE.
HON. FREDERIC NASH.
HON. RICHMOND M. PEARSON.

JUDGES OF THE SUPERIOR COURTS.

HON. THOMAS SETTLE.
HON. JOHN M. DICK.
HON. JOHN L. BAILEY.
HON. MATTHIAS E. MANLY.
HON. DAVID F. CALDWELL.
HON. WILLIAM H. BATTLE.
HON. JOHN W. ELLIS.

ATTORNEY GENERAL.

BARTHOLOMEW F. MOORE.
*WILLIAM EATON, JR., ESQUIRE.

CLERK AT RALEIGH.

EDMUND B. FREEMAN, ESQUIRE.

CLERK AT MORGANTON.

JAMES R. DODGE, ESQUIRE.

REPORTER.

JAMES IREDELL.

MARSHAL.

J. T. C. WIATT.

---

*Appointed 19th June, 1851, *vice* B. F. Moore, resigned.

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CASES IN EQUITY

ARGUED AND DETERMINED
IN

THE SUPREME COURT

OF NORTH CAROLINA,

AT MORGANTON.

AUGUST TERM, 1850.

ANDREW J. McBRAYER & AL. *v.* JOSEPH HARDIN & AL.

Injunctions to prevent persons from working a gold mine, to which the plaintiff claims title, are not put upon the same footing with injunctions to stay executions on judgments at law, where the legal rights of the parties have been adjudicated.

In cases of the former class, where it appears, that, if the defendants' allegations be true, the injunction can do them no harm, but, if the plaintiffs' allegations be true, he may sustain an irreparable injury, the injunction should be continued to the hearing, that the facts may be investigated.

Appeal from the Court of Equity of Cleveland County, at the Fall Term, 1849, his Honor Judge Ellis presiding.

J. G. Bynum, for the plaintiffs.
G. W. Baxter and Landers, for the defendants.

(2)

PEARSON, J. The plaintiffs allege that in July, 1849, they leased from the defendant, Joseph Hardin, for the term of five years, thence next ensuing, a tract of one hundred and fifty acres of land on which the said Hardin then resided, lying on the waters of little Hickory Creek, in the County of Cleveland, adjoining the land of the widow Hogue, for the purpose of hunting for gold and silver mines, and with the right and privilege of

working all the mines then known on the said land, or that might be discovered during the term of the said lease. The lease was reduced to writing and executed, and left with one Fullenwider for safe keeping, and the defendant, Joseph Hardin, afterwards got possession of it and refused to return it. The bill then states, that, afterwards, the defendants, Joseph Hardin and William McEntire, Jefferson Hoskins, Edmond Rippy, John Roberts and Dial Hardin, under his authority, entered on the land and have been working for gold, in despite of the rights and remonstrances of the plaintiff, and have done and are doing irreparible damage, by taking off large quantities of gold and working the mines in an unskillful manner. The prayer is, that the defendants may be enjoined from working on the land, included in the lease to the plaintiffs, and for an account of the gold collected by the defendants.

The defendant, Joseph Hardin, answered, but he submitted to the decretal order, continuing the injunction until the hearing, and his answer was not sent to this Court.

The defendants, McEntire and Hoskins, admit, that, in the month of August, 1849, with the consent of their co-defendant, Joseph Hardin, they worked on the land included in the lease for a short time, and made some seven penny weights of gold each. They aver, that they believed, that the said Hardin had full power and authority to put them in possession, but being afterwards informed by some of the plaintiffs, that they were
(3) entitled to all mining privileges under their lease, they quit the land before the bill was filed and have not since interfered.

The defendants, Rippy, Roberts and Dial, positively deny, that they have ever woked for gold on the land included in the lease made by Joseph Hardin to the plaintiffs. They say it is true that they have been working on land, adjoining the land of the said Hardin, but the land, on which they have been working, belongs to the defendant, Roberts, and has been notoriously in his possession for more than twenty years, and never did belong to, or was in possession of the defendant, Joseph

Hardin, and is not included in the land leased by the said Hardin to the plaintiffs.

The motion to dissolve the injunction was refused, and the injunction was continued until the hearing, from which order all of the defendants, except Joseph Hardin, appealed.

As to the defendants, McEntire and Hoskins, they admit that they worked a short time under the license of Joseph Hardin, after he had leased to the plintiffs; but they say they had left the land before the bill was filed, and have no intention further to interfere. Such being the case the injunction can do them no harm, and at the final hearing their liability to account, and their right to recover costs, can be investigated and passed on.

As to the defendants, Rippy, Roberts and Dial, they say the land, on which they are at work, is not included in the lease to the plaintiffs. If this be true, the injunction does not interfere with them and will do them no harm.

If it be not true, and they are, in fact, working on the land of Joseph Hardin, which he leased to the plaintiffs, then it is admitted, that they should be injoined. If the defendants tell the truth, the injunction can do them no harm. But, if the truth is, as averred by the plaintiffs, a dissolution of the injunction would be of serious injury to them. Hence it was necessary, (4) under the circumstances, to continue the injunction. By doing so, no harm is done on one side, and the chance of doing injury is avoided on the other. Injunctions of this kind are not put on the same footing with injunctions to stay executions on judgments at law where the legal rights of the parties have been adjudicated.

This opinion will be certified to the Court below.

The defendants must pay the costs of this Court.

Per Curiam. Ordered and decreed accordingly.

Approved. Troy *v.* Norment, 55 N. C., 318.

HEIRS AT LAW OF RICHARD LEWIS, DEC'D., EX PARTE.

A decree had been made for a sale of land for partition, the land had been sold and the money ordered to be distributed among the tenants in common. A portion of the money not having been paid out, one of the tenants petitioned to be re-embursed out of that portion for certain taxes he had paid on the land. *Held*, that the Court could make no such order, because it would be contrary to the order previously made for distribution.

Appeal from the Court of Equity of Rutherford County, at the Fall Term 1849, his Honor Judge Ellis presiding.

Richard Lewis died, seized of lands in fee, which descended to his five children, of whom his daughter, Mary, married John McDowell. In May 1840, a suit, was instituted between the heirs for partition; and a decree was made therein for a sale of the land
(5) by the Clerk and Master for the purpose of partition. The sale was made, reported and confirmed, and the Master was ordered to collect the purchase money; and it was decreed, that the costs of the suit should be paid thereout, and that one-fifth part of the residue should then be paid to each of the parties, as and for his or her share thereof. The master collected the money and made various payments to the several heirs; but there remained in the office a part of the money, in May 1849. McDowell then filed a petition in the cause, setting forth that he had paid taxes on the land descended, and the costs of two suits at law with third persons in respect to a part of the lands, to the amount of $161.19, and that all the other parties reside out of the State; and praying that the same may be held to be a charge on the fund in the Court and ordered to be paid thereout. It was therefore ordered, that the master should make no further distribution of the money, and the master was directed to enquire what sum was due to McDowell in the premises. He reported the sum claimed as above, and in November 1849, the report was confirmed, and an order made for payment out of the fund in Court, from which an appeal was allowed to the other side.

N. W. Woodfin, for the plaintiff.
J. Baxter, for the defendants.

RUFFIN, C. J. The demand is not for costs or expenditures in the partition suit, in which case it ought to be satisfied under the original decree. But it is for other advances, made by one of the tenants, on account of the estate held in common; and there is no doubt, that, for such advances, he has a just claim against his co-tenants, and, also, that in equity he might have looked to the estate for his indemnity, if duly asked for, in apt time.

That might have been done in the bill for partition,
(6) and the claim would have been provided for, either out of the profits of the estate or the proceeds of the sale; or probably, the party might have moved for an enquiry and gone before the master, at any time before the fund had been disposed of by the Court. But, as the case stood when the partition was filed, the fund was beyond the reach of the party—at least, in this method of proceeding. The estate was no longer in common, but had been divided and allotted in severalty, or, which is the same thing, it had been sold and the proceeds divided or ordered to be distributed in certain proportions and ascertained sums. This demand was not, then, against a common fund, but against the respective tenants in common for their several shares; and, of course, it no more attached upon this fund, than any other debt of one or more of the persons, who are the heirs. It was argued, that, as a portion of the money has not actually been distributed, but remains in the office, the Court may properly lay hold of it, for the satisfaction of this one of the former co-tenants. But the objection seems to be decisive, that it cannot be done, witout flying in the face of the decree hitherto made; and, indeed, the first step taken on the petition, and unavoidably taken, was to order the master to violate that decree, by not making the distribution and payments therein directed. The first decree was thus left in full force, and, at the same time, it was contradicted and to be disobeyed by the order of the Court—which is not allowable. It could be put out of the way

only by reversing it upon a proper proceeding, which is not attempted here. Indeed, there is no ground for reversing it, since the matters now brought forward, were not then presented to the Court, and most of the claim is, in fact, for payments made since the decree. Under those circumstances, the Court cannot arrest the execution of the decree, or otherwise interfere in that cause between the parties, and the order appealed from
(5) was consequently erroneous, and it must be so certified. The petitioner, McDowell, must pay the costs in this Court.

PER CURIAM. Ordered and decreed accordingly.

ENOCH H. CUNNINGHAM *v.* WILLIAM W. DAVIS.

A mortgagor, who has not paid the amount of the money loaned on the morgage and admitted to be due, nor brought it into Court, cannot enjoin the mortgagee from collecting the amount due, nor from recovering in ejectment the mortgaged premises, although the plaintiff alleges that the contract was usurious.

Appeal from the Court of Equity of Buncombe County, at the Spring Term, 1850, his Honor Judge CALDWELL presiding.

N. W. Woodfin and J. W. Woodfin, for the plaintiff.
J. Baxter, for the defendant.

PEARSON, J. The case made by the bill is, that the plaintiff borrowed from the defendant the sum of $1,000, for which he was to pay 10 per cent. annually by way of interest, and to cover this usurious transaction, the title to certain lands which the plaintiff had bought, but had not paid for, was conveyed to the defendant; and the parties entered into a covenant, that the plaintiff was to lease the land, from year to year as long as he saw proper, at the annual rent of $100, and was to have the fee simple, whenever he paid the sum

of $1,000, together with the rent. The plaintiff
(6) paid the agreed sum for some five or six years, when he failed to pay, and the defendant brought suit and recovered judgment for $233, the rent for two years and a third: and also brought an action of ejectment, upon which he has judgment, and he is about to sue out execution upon both the judgment for the $233 and the judgment in ejectment. The prayer is for an account, and for a conveyance in fee, upon the payment of the sum of $1,000 and six per cent interest, deducting the sums already paid, and for an injunction, restraining the defendant from issuing execution, both upon the judgment for the $233, and upon the judgment in ejectment.

The defendant denies the case made by the bill, and avers, that the plaintiff, having bought the land and being unaple to pay for it, he took it off of his hands, and advanced $1,000, and took the title to himself as a purchaser, and agreed to lease the land to the plaintiff, at the annual rent of $100, and to make a title in fee to him at any time, when he paid the $1,000, together with the said annual rent of $100 for the time he was in possession; and he declares a readiness still to convey the land to the plaintiff, upon the terms aforesaid.

It is unnecessary to consider the answer; for we think that, according to the plaintiff's own allegations, there is no error in the decretal order of the Court below, by which the injunction was dissolved. The plaintiff, by his own shewing, is a mortgagor, in arrear some six or seven hundred dollars, after allowing all credits; and there is no ground, on which he can enjoin the collection of the judgment for the $233, or refuse to give up possession to the mortgagee, as he has not paid the balance of the money admitted to be due, nor brought it into Court.

This opinion will be certified to the Court below, and the plaintiff must pay the cost of this Court.

PER CURIAM Ordered and decreed accordingly.

Approved. Isler *v.* Koonce, 81 N. C., 378.

SAMUEL MEADOWS *v.* SAMUEL SMITH.

The plaintiff was a poor, ignorant old man, who had never had a law-suit in his life. He was arrested on a groundless charge of conspiracy at a late hour of the night, and having his fears excited by the falsehood and artifice of the defendant's agent, for the purpose of being released, executed a note for a certain sum. *Held*, that this note was procured from him by fraud and duress, and that he was entitled in Equity to have it cancelled.

It is as much against conscience, to attempt to avail one's self of the iniquity of an agent, after it is known, as if there had been preconcert.

The case of *Heath* v. *Cobb*, 17 N. C., 191, cited and approved.

Appeal from the Court of Equity of Buncombe County, at the Extra Term in July 1850.

Gaither, for the plaintiff, submitted the following authorities:

Torley v. *Jasper*, 3 N. C., 583; *Moore* v. *Hylton*, 16 N. C., 429; *Heath* v. *Cobb*, 17 N. C.

J. W. Woodfin, for the defendant.

PEARSON, J. The plaintiff alleges, that he is a poor, ignorant old man, seventy-five years of age, and he never had a law suit before in his life. In January 1848, the defendant issued a writ against him and his son and one Davis, in case for conspiracy, laying the damage at $500. The officer, one Wells, came to his house about midnight and arrested him; and, after exciting his fears by telling him, that the lawyer, who issued the writ, said he would do well to compromise by giving his note for $300, and by telling him, that, if it went to
(8) Court, the State would take it up and ruin him, and, for the second offence, would hang him, advised him, as a friend, that he had better go to the house of the defendant and settle, and said he thought he could get him off for $100. After being in custody until morning, he concluded to go to the defendant and buy his peace. The officer took him to the defendant's house, some twelve miles distant. He was not at home, and the plaintiff, after remaining under arrest all day, his alarm

and apprehension being increased by the combined artifice of the wife of the defendant and the officer, agreed, if he could be discharged, to execute a note to the defendant for one hundred dollars, and pay the officer thirteen dollars, which was accordingly done, and he was liberated. The plaintiff further alleges, that the defendant had no cause of action against him whatever; that the alleged ground of complaint was, that his son, who had been summoned as a witness, in the case of the State for Farmer & wife and others against one McLure, on his bond as Clerk and Master, had failed to attend at October Term 1845, in consequence of which the case was continued; and the charge was, that his son had staid away, by a conspiracy between the plaintiff, his son and Davis. The plaintiff admits, that his son did not attend at that term; but avers that he attended before and afterwards, and his testimony was in no wise material, and he was subsequently discharged by the defendant from attendance, and the case was decided by arbitrators, before whom his son was not examined.

The plaintiff further alleges, that he had no agency in keeping his son from attending Court, and no wish to do so; that he had no interest, connection or concern with the suit, and knew not that the defendant had any; that the defendant was not a party of record, and the plaintiff had no knowledge nor belief that he was beneficially interested. The plaintiff avers, that, one year after he had recovered before the arbitra-
(9) tors, the defendant issued the writ, without cause and for the mere purpose of taking advantage of him, and had, by the falsehood and artifice of his agent and co-adjutor, the officer who served the writ, taken advantage of his ignorance and fears, and extorted from him the note of $100, upon which the defendant has since taken judgment and is about to issue execution. The prayer is for a perpetual injunction.

The defendant denies that there was any concert between him and the officer, to take advantage of the plaintiff and extort the note from him. He says, that,

believing the plaintiff had entered into a conspiracy to keep his son from attending Court, whereby he was greatly injured, he directed his attorney to issue the writ, left home and did not return, until after the case was compromised and the note executed, when he received it and intended to collect it. He does not state the grounds of his belief as to the alleged conspiracy, nor aver the materiality of the testimony of the plaintiff's son, nor assign any motive why he should wish him not to attend, and gives no color to the charge of conspiracy; nor does he show any damage, excepts he thinks he had to pay the costs of the term for a continuance. He admits, however, that it does not so appear on the record, and he admits he recovered before the arbitrators, without the testimony of the plaintiff's son: but he says, that, though not a party of record, he was beneficially interested: and complains, that the award was only for $175, when more was due, but he does not aver that the result would have been different, if the plaintiff's son had been examined, or that he desired to examine him. He says, "that as to the age and ignorance of the plaintiff, your respondent knows but little, and as to his poverty, that is immaterial." "He believes his wife and son and brother compromised the case in his absence, because she was desirous of keeping your respondent out of litigation." He does not believe that they resorted to any artifice or fraud to alarm
(10) the plaintiff, who compromised willingly, not because he was in fear, but because he knew himself to be guilty. He further says the officer was not authorized to act as his friend in effecting the compromise, "nor was he authorized, by any undue or false and extravagant language, to endeavor to coerce the plaintiff into a compromise. Whatever of nonsensical, false or other matter the said deputy sheriff conveyed to the plaintiff, your respondent claims that he is in no wise responsible for, even if the facts were true: and that the officer was barely authorized to make known to the defendants in that suit the terms, upon which they could have the suit compromised: for this defendant, so far from combining with the officer, was not even friendly

towards him and had no confidence in him. At what hour of the night or day the deputy sheriff served the writ, your respondent is ignorant."

In the language of the Court in the case of Heath v. Cobb, 17 N. C., 191, the plaintiff "was under duress, in the eye of a Court of Equity. He was not in a condition to be dealt with; he could not and did not stand on his rights." No one can believe that the plaintiff executed the note for the purpose of making compensation for an injury done to the defendant. On the contrary, every one who hears the bill and answer read over, is convinced that he executed it to relieve himself from the state of alarm and embarrassment in which he was involved.

The equity of the bill rests upon three allegations—The plaintiff was a poor, ignorant, old man, who had never had a law suit in his life. The defendant, without probable cause, issued a writ against him for a conspiracy—damages $500. The plaintiff, being arrested and having his fears excited by the falsehood and artifice of the defendant's agent, executed the note to relieve himself.

The answer does not meet this equity. "As to the age and ignorance of the plaintiff, your respon-
(11) dent knows but little;" and "his poverty is immaterial." Can this be called a full and fair answer to the first allegation?

He says, he honestly believed, the plaintiff was guilty of a conspiracy; but he sets out no ground for his belief, and leaves the mind at a loss, even to conjecture, why he should have taken up such an idea. A witness, in an unimportant suit upon the bond of a Clerk and Master, fails to attend at one term, having attended punctually before and after, until discharged. The plaintiff, his father, has no interest or concern in the case, nor did he know that the defendant had; and this forms the basis of a grave charge of conspiracy!

As to the third allegation, the defendant says, "he is ignorant at what hour of the night or day the defendant made the arrest;" but he positively denies, that he was authorized to coerce a compromise, by exciting the

fears of the plaintiff, and claims not to be responsible, if such was the fact. The officer was the agent of the defendant in executing the writ, and it is admitted, that he was authorized to make known to the plaintiff the terms, upon which the suit could be compromised. Such being the case, it was as little as the defendant could have done, to make enquiry as to the truth of the allegations, made in respect to the conduct of his agent, before he adopted his act, by receiving the note and attempting to collect it, and, especially, before he swore to the answer, and then to have stated his belief. His neglect to do so raises an inference against him. In fact, he admits the allegation, but claims not to be responsible for the unauthorized acts of the officer. Upon this point of morals, the defendant is clearly in error. It is as much against conscience to attempt to avail one's self of the iniquity of an agent, after it is known, as if there had been pre-concert. There is but a slight shade of distinction between the guilt of one, who receives goods, knowing them to be stolen, and of him, who pro-
(12) cures the theft to be committed. We think the answer is unfair and evasive. It is error to dissolve the injunction, and it ought to have been continued until the hearing, because the equity of the bill is not met.

Perhaps, when the case is heard, the proof may show that the defendant had good cause of action. If so, it may be proper to adopt the course taken in Heath v. Cobb, and, instead of making the injunction perpetual, the Court may be induced to hold up the judgment, as a security for any damages the defendant may be able to recover in an action at law; and, to this end, to remove the impediments to such action, growing out of the compromise and the Statute of Limitations. But we presume it will require a strong case to justify such a course, when the damage is trifling, and "the play is not worth the candle." It is clear that the defendant cannot conscientiously touch one cent of the plaintiff's money, until he has established his damages by an action at law. And we cannot help feeling, that the conduct of the plaintiff's wife, in her laudable wish "to

keep him out of litigation," would have been more praiseworthy, if she had let the old man go home, without giving his note.

This opinion will be certified to the Court below, and the defendant will pay the costs of this Court.

Per Curiam. Ordered and decreed accordingly.

Approved. Black *v.* Baylees, 86 N. C., 527; Osborne *v.* McCoy, 107 N. C., 726.

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(13)

ABRAM SELLERS vs. WILLIAM STALCUP & AL.

A deed, absolute on its face, may be converted into a mere security for money lent, by an allegation that such was the intention, and that the condition was omitted by mistake or surprise, or by the fraud or oppression of the party, who procured its execution, provided the allegation is clearly established by parol evidence of admissions and declarations of the party, aided and confirmed by facts and circumstances.

Where, in a case of that kind, the admissions of the party were proved, and his answer to a bill filed against him was unfair and equivocal, and where it was also proved that the sum paid was grossly inadequate as a consideration for an absolute sale—that the plaintiff was in need of money and was in the power of the defendant, who held executions against him—and that the plaintiff retained possession for some short time, made a contract to sell the land and put tenant in possession to hold for him, who did so, until the defendant expelled him; *Held,* that under these circumstances the deed should be held merely as a security for the money actually advanced.

Cause removed from the Court of Equity of Macon County, at the Spring Term 1850.

N. W. Woodfin, for the plaintiff.
J. Baxter, for the defendants.

Pearson, J. The plaintiff bought a tract of land from one Allen, and paid for it, with the exception of the last instalment, for which the defendant, William, who was a constable, took judgment and held an execution.

He also had other executions against the plaintiff, amounting in all to $91. In October 1839, the defend-

ant, William, at the request of the plaintiff, ad-
(14) vanced the $91 and discharged the executions,
and the plaintiff executed to him a deed for the land. The deed is in the usual form, the consideration expressed is $300, and it was acknowledged by the plaintiff and registered in June 1841. The plaintiff continued in possession for a short time after the execution of the deed, when he contracted to sell the land to one Jackson for the price of $400, and put one Buchanan in possession, to hold for him until it was convenient for Jackson to move to the land. In about ten days thereafter, the defendants expelled Buchanan, and took possession without the consent of the plaintiff, and have held possession ever since. The defendant, William, afterwards refused to let Jackson into possession; in consequence of which his contract of purchase made with the plaintiff was not carried into effect; and the defendant, William, executed a deed to his son, the other defendant.

The plaintiff alleges, that, being hard pressed for money to pay off the executions, held by the defendant, William, he applied to him for a loan of the sum required for that purpose, and he agreed to advance the money, provided the plaintiff would execute to him an absolute deed for the land, with the understanding that it was to be a mere security for the money, which was to be repaid with interest, as soon as the plaintiff could effect a sale, when the deed was to be cancelled: that, accordingly, an absolute deed was executed, and the defendant advanced the sum of $91, with which the executions were satisfied; and that the plaintiff soon afterwards contracted to sell the land to Jackson for $400, of which $100 was to be in the Spring of 1840, and out of which the plaintiff intended to repay the $91 and interest; but the trade with Jackson was defeated, in consequence of the defendants' taking forcible possession and refusing to allow the title to be made to Jackson, whereby it was put out of the plaintiff's power to
repay the $91. The plaintiff further alleges, that
(15) the insertion of $300, as the consideration, and
the omission to insert the condition as to the

right of redemption, was a contrivance on the part of the defendant, William, to oppress the plaintiff, who was in his power, and to defraud him out of the land: and that the deed of the defendant William to his son, the other defendant, was made without consideration, and with notice, and intent to hinder the plaintiff's remedy.

The prayer is to redeem and for an account of rents and profits.

The defendant, William, denies that the deed was intended as a mere security for the $91, or that there was any fraud in omitting to insert the alleged condition, and alleges that he purchased "*bona fide;*" but he does not allege positively, that he purchased for the price of $300. His allegation is, "that he has long ago paid to the plaintiff the sum of $300, including the payments made at the request of the plaintiff, by the extinguishment of various judgments and executions, which were due and owing by the plaintiff, the last of which payments was $100 paid in cash by him to the plaintiff, upon the receipt of which he expressed himself fully satisfied."

The defendant, Peter, denies notice of the plaintiff's claim, but does not allege that he paid any consideration to his father.

It is settled, that a deed, absolute on its face, may be converted into a mere security for money lent, by an allegation that such was the intention, and that the condition was omitted by mistake or surprise, or by the fraud and oppression of the party, who procured its execution: provided the allegation is clearly established by parol evidence of the admissions and declarations of the party, aided and confirmed by facts and circumstances. . .

We think the plaintiff has made out his allegation in the manner required. Many witnesses prove admissions and declarations of the defendant, William, at different times, that the deed was intended as a
(16) security for the $91, advanced to discharge the executions, and that he gave as a reason for not having the deed registered at an earlier day, that the

plaintiff was to have back his land and the deed was to be cancelled, provided the money and interest were repaid in silver: but he insisted that the plaintiff had forfeited his right, by failing to pay at the time and in the manner agreed on. So the parol evidence is plenary, and, in fact, the only question made upon the argument was, as to the facts and circumstances, which the rule requires to support this evidence.

We think that part of the rule has also been fully met.

The defendant does not venture to allege positively, that he purchased at the price of $300, but answers in an unfair and equivocating manner.

The land was worth $400; and $91, the sum advanced and which is proven to have been paid, was grossly inadequate, as a consideration for an absolute sale.

The plaintiff was in need of money, and was in the power of the defendant, who held executions against him.

The plaintiff retained possession for some short time, made a contract to sell to Jackson, and put a tenant in possession to hold for him, who did so, until the defendants expelled him; which gives a complexion to the case, very different from what it would have been, if they had been let in by the consent of the plaintiff.

These four facts are inconsistent with the idea of an absolute purchase, and tend strongly to support the allegation, which is established by the parol evidence, that the deed was intended merely as a security, and that the defendant fraudulently and oppressively insisted, as a condition for lending the money, that the deed should be absolute on its face, which was "yielded to by a necessitous man."

On the other hand, the defendant has examined the two subscribing witnesses. One of them, his son, of bad character, swears that he witnessed the deed (17) and saw the purchase money paid -he does not say what sum and speaks in the most general terms. The other says, he drew the deed, became a subscribing witness, and saw between seventy-five and one hundred dollars paid. In answer to a leading question put by the defendants, he says he understood it was for

the last payment for the land. He does not say what was the price given for the land; whether the terms of the contract were stated over to him; why $300 was inserted as the consideration, or who asked him to draw the deed; and leaves it uncertain, whether the money he saw paid was not the last payment to Allen, from whom the plaintiff had purchased it and to whom all but the last instalment has been paid.—This is the only way, in which his testimony can be reconciled with repeated admissions, afterwards made by the defendant, William, at different times and to different witnesses. Another witness of the defendant says, he does not think the land is worth more than $150. This is inconsistent with the allegation, that the defendant had paid $300 for it, and this witness is also a man of bad character, and is contradicted by two witnesses, who fix the value at $400. The circumstance, that $300 is inserted in the deed as the consideration, entirely unexplained, as it is, by the person who drew the deed, has no weight. It may have been inserted, because it was the price given by the plaintiff to Allen. At all events, as the deed was to be an absolute one on its face, the consideration made no difference, in the absence of all proof, that more than $91 was paid; especially as 'the various judgments and executions due and owing by the plaintiff,'' which are alleged to have been paid, in addition to the $100 in cash, so as to make the sum $300, are not produced nor accounted for, except the admitted amount of $91. So the circumstance, that the deed was acknowledged by the plaintiff in 1841, can, of itself, have no influence, for, if the plaintiff had not acknowledged
(18) it, there were two subscribing witnesses, either of whom could have proven its execution; and there is no allegation of a subsequent arrangement, by which the original mortgage was changed into an absolute sale, and no proof tending to show that such was the fact.

So the circumstance, that no bond was given for the $91, has no weight. There is a marked distinction between landed security of ample value, so as to make the debt safe at all times, and a bonded security upon per-

sonal property, which may perish—when the absence of a bond has a tendency to rebut the idea of a loan. The only circumstance, which operates against the plaintiff, is his neglect to sue for six years after the defendant had taken possession. This does not, however, raise a presumption of an abandonment of his claim, and, we think, it is sufficiently accounted for by the fact, that the defendants had, by their own act, put it out of the power of the plaintiff to effect a sale of the land, and make a tender of the money lent.

As to the defendant, Peter Stalcup, he is a volunteer, and the question of notice has no bearing.

It must be declared, that the deed was intended as a security for the payment of $91 and interest, advanced by the defendant, William Stalcup, for the use of the plaintiff, and that the omission to insert the condition in the deed was caused by the fraud and oppression of the said defendant, and the plaintiff must have a decree to redeem, and for an account of the rents and profits, while the defendants have been in possession, and the defendants must pay the costs.

Per Curiam. Decreed accordingly.

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(19)

ROBERT MURRAY & WIFE vs. ELISHA KING.

Equity never gives relief upon an executed contract, except on the ground of accident, mistake or fraud

Where the feme plaintiff had conveyed her estate in dower to the defendant, and he had covenanted, in consideration thereof, to support her, *Held*, that, if he failed to do so, she could not set aside the whole contract, but must resort to her remedy at law for damages.

Cause removed from the Court of Equity of Buncombe County, at the Spring Term 1850.

N. W. Woodfin and J. W. Woodfin, for the plaintiffs.
J. Baxter, for the defendant.

Nash, J. The bill charges, that, in the month of February 1842, the plaintiff, Susannah, then the widow of her former husband, David McCarson, and then being in bad health, and the defendant, entered into a contract, in writing and under seal, whereby she sold and conveyed to the said King all her right, title and interest in and to her right of dower in the land of her deceased husband: in consideration whereof the said King agreed to find the said Susannah McCarson "her board in his house, as long as she lived, and make her comfortable, as is convenient," &c.; that the plaintiff continued to live with the defendant, who had married her daughter, until the succeeding fall, when, in consequence of his failing to provide her with the comforts of life, and becoming irritant and petulant, she left him and went to live with her mother, after whose
(20) death she returned to the defendant's house, lived with him a few weeks and finally left him and went to live with another daughter, and "intermarried with the other plaintiff, Robert Murray." The bill charges that the defendant has refused and still doth refuse to support the plaintiff, Susannah, or to do any thing for her, and prays that the contract may be rescinded, and the defendant be decreed to account for the rents and profits of the land, since she left him.

The answer admits the due execution of the deed, as set forth in the complainant's bill, and the intermarriage of the plaintiff—denies that the defendant ever treated the said Susannah unkindly, or ever failed to make comfortable provision for her, as stipulated between them, and avers that he is still ready and willing to comply with his contract, and submits whether any equity is charged in the bill.

Replication was taken to the answer, and, the cause being set for hearing, was transmitted to this Court.

The plaintiff seeks to set aside an executed contract. This equity never does, but upon the ground of accident, mistake or fraud. 1 Story's Eq. Juris. secs. 161 and 439, and the cases there cited. Here relief is asked for upon neither of those grounds. It is not pretended, that the contract is different from what the plaintiff in-

tended it should be—nothing is omitted which she wished inserted—nothing inserted which she did not intend should be.—Nor is it alleged, that any fraud was perpetrated on her in making the contract. But the true secret is revealed. At the time she made the agreement, she was in bad health and did not expect to live long. She subsequently recovered her health, so far that she again entered into the marriage state. All this is set forth in the bill. The contract is an executed one. The plaintiff, Mrs. Murray, conveyed to the defendant, who had married her daughter, her right to the land allotted to her, as her dower in the land (21) of her former husband; and the defendant in consideration thereof covenanted, that he would find her board in his house, as long as she, the said Susannah McCarson, should live, and to make her as comfortable as is convenient." The plaintiff alleges, that the defendant has broken his contract. If so, a Court of common law is fully competent to give her redress in damages. That is the proper course to pursue. For it is a principle in Equity, that, whenever the party complaining can be fully compensated in damages and there is a perfect remedy at law, a Court of Equity will not entertain jurisdiction of the cause.

Per Curiam. Bill dismissed with costs.

WILLIAM D. JONES vs. WILLIAM H. GORMAN.

Where a person fraudulently conveys property to another, with the view of defeating his creditors, Equity will not assist him to procure a reconveyance.

Cause removed from the Court of Equity of Buncombe County, at the Spring Term 1850.

J. W. Woodfin, for plaintiff.
N. W. Woodfin, for defendant.

Nash, J. To the bill filed in this case the defendant has demurred, for want of equity apparent on its
(22) face.— The plaintiff and defendant were partners in the purchase and sale of live stock. In the course of their dealing, the former became indebted to the latter, who was also his surety at bank. To secure the debt due to the defendant and also to secure him against loss on the bank debt, a conveyance was made by the plaintiff to one Simon Overby, in trust, of a valuable tract of land. The debt to the defendant was four hundred dollars, and that due to the bank three hundred and thirty, and the land conveyed, according to the bill, was worth from two thousand to twenty-five hundred dollars. The plaintiff, at the time the deed of trust was made, was largely indebted to other creditors. The money due to the defendant was not paid at the time specified in the deed, and the trustee, at his instance, proceeded to advertise and sell the land, when the defendant purchased at the price of three hundred and eleven dollars. Other creditors of the plaintiff reduced their claims to judgments, and threatened to levy their executions on the land and have it sold. To secure it against these executions, it was agreed between the plaintiff and the defendant, that the former should make to the latter a direct and absolute deed of conveyance; and, to give color to the transaction, that he should at the same time execute a bond, payable to the defendant, for six hundred dollars. All this was done, and a conveyance and bond executed, dated the 10th of October 1845. The bill alleges that both these instruments were without any consideration, and that the latter was immediately returned to the plaintiff. The plaintiff asks, that the defendant shall, by a decree of this Court, be declared a trustee for him of the land, that an account may be taken of the rents and profits, while in his possession, and of what is due from the plaintiff, and, upon his making payment thereof, that the defendant may be decreed to reconvey.

It is difficult to conceive a case more completely within the operation of the Statute of Frauds. In
(23) all its features it is precisely such a transaction,

as the statute of frauds was made to provide against. The conveyance of 1845 was made by the parties, with the avowed purpose of protecting the land against the plaintiff's creditors. The whole transaction, as set forth in the bill, so far as the conveyance of the land is concerned, is an unblushing attempt, on the part of the plaintiff and the defendant, to defraud the creditors of the former out of their just claims. The statute, however, while it declares such a conveyance fraudulent and void, as to the grantor's creditors, at the same time pronounces it good and valid between the parties. This policy is adopted as most likely to put a stop to such frauds. It was thought that no man of common prudence would repose such confidence in an individual, who would be guilty of joining in such a nefarious transaction, if he did not not know he must bide the consequence, and see his guilty partner enjoy the fruit of their joint wickedness. Between such parties Equity will not interfere, but leave them where they have placed themselves. Here both parties are in *pari delicto*. Story's Eq. Jur. sec. 695.

Per Curiam. Demurrer sustained and bill dismissed with costs.

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(24)

THOMAS S. DEAVER vs. JOSEPH ELLER & AL.

A Court of Equity will restrain, by injunction, the assignor of an equitable claim from dismissing a suit at law, brought by the assignee in the name of the assignor.

It has been repeatedly decided, that, on a motion to dissolve an injunction, it must appear that the answer fully meets the plaintiff's Equity—it must not be deficient in frankness, candor or precision, nor must it be illusory.

The cases of *Little* v. *Marsh*, 37 N. C., 18, and *Miller* v. *Washburn*, 38 N. C., 161, cited and approved.

Appeal from the Court of Equity of Buncombe County, at the Special Term in July 1850.

N. W. Woodfin, for the plaintiff.
J. W. Woodfin, for the defendant.

Nash, J. The defendant, Eller, was indebted to the defendant, Hamilton, who held his notes for the amount due, payable at different times. Among them was one for one hundred and fifty dollars, payable on a particular day, at the house of Eller, in property. This note was, for valuable consideration, transferred by Hamilton to the plaintiff, who attended at the time and place designated, to receive payment. The bill alleges, that, after the transfer of the note, the plaintiff informed Eller of the fact, who promised to pay it, and that, when he attended to receive the property, in discharge of it, horses and an old cow were offered him, which he refused to receive, they being entirely worthless. The bill then alleges, that he brought suit on the note in the Superior Court of Law of Buncombe County
(25) against Eller, and, upon the trial, the defendant was allowed to show any payments he had made to Hamilton, and did prove one for forty dollars, and a verdict was rendered for the plaintiff for the sum remaining due upon the note. An appeal was taken by the defendant to the Supreme Court, where the cause is pending; and the defendant, Hamilton, acting in concert with the defendant, Eller, with a view to defeat the action and defraud the plaintiff of his just rights, has instructed an attorney of the Court to dismiss the suit.—The prayer is, that the defendants and all other persons, acting under them, may be enjoined from dismissing the said suit or interfering therewith. It avers the entire insolvency of Hamilton.

The answer of Hamilton admits his insolvency, and the transfer of the note in controversy to the plaintiff—but alleges, that, after Eller, the maker, had executed it, he, Hamilton, had agreed, that it might be discharged by Eller's taking up debts, due by him to other persons; and that he communicated this fact to the plaintiff at the time of the transfer, and it was agreed between them that Eller might still so discharge it, and if, upon being informed of the transfer, he, Eller, should object to it, the trade between him, Hamilton, and the plaintiff should be cancelled and the note returned. It

admits the directions given to the attorney, as to the dismission of the suit in the Supreme Court.

The answer of Eller adopts the answer of Hamilton, as to the transactions between them, and avers his belief, as to those stated to have taken place, upon the transfer of the note to the plaintiff. It avers the payment by Eller for Hamilton of three debts—one for five dollars, and another for ten, and one to J. M. Alexander, which was credited on another note, held by Hamilton on him. It denies that the property, tendered by him, was as worthless as the bill alleges, and avers that the payments made by him for Hamilton, and money
(26) actually advanced and articles furnished for the support of him and his family, has kept him from that time indebted to the said Eller. The answer further alleges, that Eller made the tender under a mistake of the law, that, as the plaintiff took the note before it was due, he believed he held it discharged from any equitable defence he might have against Hamilton, and that the plaintiff took the note, under a full knowledge of the agreement between Eller and Hamilton, as to the right the former had in taking up debts against the latter, and that he had been taking up such debts and claims, that they should be applied to the discharge of the note. It further alleges, "that he complained to the plaintiff and endeavored to show him the injustice of his course, claimed his payments to the said Hamilton at once, on learning he was going to insist on trying to collect the said note from this defendant." It then avers, "that the debts, so taken up by this respondent for the said Hamilton, were taken up as above set forth, and, if not actually applied, were intended to be applied to this particular debt." It admits the directions given to the counsel in the Supreme Court in the suit at law.

On the coming in of the answers, a motion was made to dissolve the injunction theretofore granted, which was refused, and the defendant, Eller, appealed to this Court.

The power of a Court of Equity to grant the relief asked for in the bill is not denied. It is, indeed, a familiar principle, and exercised in proper cases to restrain

a person, who has parted with his equitable right in a contract, not assignable at law, from interfering to prevent his alienee using his name in enforcing it in a Court of law. The right to do so is considered a part of the contract. 2 Story's Eq. Jur., sec. 1040, and Equity will compel the assignor to permit the use of his name, sec. 1050 The defendants say, however, that the circumstances of this case do not bring it within the op- (27) eration of this rule. We have taken a different view of the case, and agree with his Honor below, that the injunction ought not to be dissolved. The defendant, Eller, was indebted to his co-defendant, Hamilton, in several notes, the one now in controversy being the last falling due. This the only one we have any thing to do with, was payable in specific articles at a fair valuation. It was, therefore, not assignable at law, and, when sold to Deaver, the plaintiff, the assignment transferred only the equitable right to the money secured by it. In order to collect it at law, he was obliged to bring the action in the name of the original payee, Hugh Hamilton. This he did; and, upon a threat on the part of the nominal plaintiff to dismiss the suit, this bill is filed. The bill sets forth a clear case for the interference of the Court, unless the answers have removed the plaintiff's equity. The answer of Hamilton alleges, that when he made his transfer of the note to the plaintiff, he informed the latter, that it was a part of the agreement between him and Eller, that, although the note was payable in specific articles, it might be discharged by Eller, by taking up and paying other debts due by him to other persons; and that Eller might still possess the right to do so; and that, if Eller did not agree to the transfer, the contract between him, Hamilton, and the plaintiff, was to be cancelled and the note returned.—This answer is adopted by Eller as his. The first observation such a statement suggests is, of what possible benefit could the note be to the plaintiff, if the debtor, Eller, was at liberty to discharge it, by purchasing or procuring claims to the amount of it. The latter, it is admitted on all hands, was entirely insolvent. But, further, the bill alleges, that, upon the transfer of the note

to the plaintiff, he notified the defendant, Eller, of the fact, who promised to pay it; and that he, the plaintiff, attended, at the time when the note fell due and at the place designated, to receive the articles, when the
(28) defendant tendered to him an old cow and two horses of little or no value. Eller in his answer makes no reply to the allegation of notice or the promise to pay, but slurs the whole matter over by stating, that immediately upon learning that the plaintiff was going to insist on trying to collect the said note from him, he complained to him the injustice of his course and claimed his payments to the said Hugh, &c. This allegation on the part of the plaintiff is a material one and the failure of the defendant, Eller, to notice it, deprives the answer of that fullness on this point, which is required in answering a bill praying an injunction. The allegation above stated is not answered, and we must consider it, *pro hac vice*, as true. If not true, Eller would, immediately upon being notified of the transfer, have claimed the privilege, and not have given an unqualified promise to pay. And, indeed, so far from claiming the alleged privilege, at the time the property was to be delivered, he actually tendered articles, as described in the note, which he avers were valuable.

Towards the close of his answer, the defendant, Eller, states, "that the debts, so taken up by this respondent for the said Hugh, were taken up as above set forth, and, if not actually applied, were intended to be applied, to the payment of this particular debt." The only debts of Hamilton, which the answer sets forth in the preceding part of it, as having been taken up by Eller, were the $5 and the $10 debts, and the one to Alexander, and the latter, it is admitted, was applied to another note, held by Hamilton on Eller. It is true, he commences the statement of the payment of these two small notes, by saying, "this defendant does not now recollect each particular debt paid by the said Hugh," &c. It is natural to presume, that, in taking up claims against an insolvent man, by which the defendant ex-
pected to discharge a claim against himself, he
(29) should at least make a memorandum of them;

and it is not to be presumed, that he would fail to lay such memorandum before the solicitor, who drew his answer. He ought to have set forth in his answer, specifically, every debt of Hamilton he did so take up. But a sufficient answer to this portion of the defence is, that the defendant has already been allowed the full benefit of it. The bill sets forth, that, on the trial at law, the defendant, Eller, was allowed by the Court to prove what payments he had made for and on account of Hamilton; and that a payment of $40 was proved by him and allowed by the jury, which was, in truth, a payment made on a preceding note. This allegation is not answered by the defendant, Eller. It is not to be doubted, that, on the trial at law, he brought before the jury all payments and set-offs to which he was justly entitled. If he did not, it was his own fault.

It has been repeatedly decided in this Court, that, on a motion to dissolve an injunction, it must appear, that the answer fully meets the plaintiff's equity. It must not be deficient in frankness, candor or precision, nor must it be illusory. In all these particulars, the answers in this case are defective. *Little* v. *Marsh*, 37 N. C., 18; *Miller* v. *Washburn*, 38 N. C., 161.

We see no error in the interlocutory order made in the cause below.

This opinion will be certified to the Court of Equity of Buncombe County, and the defendant will pay the costs of this Court.

PER CURIAM. Ordered and decreed accordingly.

Approved. Lea *v.* Brooks, 49 N. C., 423; Dibble *v.* Scott, 58 N. C., 164.
Dist. Green *v.* Campbell, 55 N. C., 446.

(30)

WILLIAM M. BROWN vs. ALEXANDER BROWN.

A testator devised to his son A. a certain tract of land, and to his son W. another tract, and directed that A. should erect on W.'s land a dwelling house within ten years of the date of the will, and, to enable him to do so, lent A. the use of a negro man and a wagon and four horses for ten years. At the end of ten years the house had been commenced but was not finished, and what had been done was not done in a workmanlike manner: Held, that W. was not entitled to recover from A. the hire or profits of the negro and wagon and horses, but that he was entitled to recover such a sum as would be sufficient to enable him to finish the house in a workmanlike manner.

Cause removed from the Court of Equity of Rowan County, at the Spring Term 1850.

No counsel for the plaintiff.
Craig, for the defendant.

PEARSON, J. The will of James Brown contains the following clause. "I will and bequeath to my three sons, James L. Brown, Alexander Brown, and William M. Brown, the tract of land, whereon I now live, to be divided equally among them, Alexander to have the house, where I now live; James to have the house where he now lives, and William to have his part on the east side of Cram Creek. It is further my will, that Alexander have a good dwelling house and kitchen built on William's part, within ten years from the date of this will, and that, at the expiration of ten years, my son William to have the right, either to take the part of the land on the east side of Cram Creek, or that part on which the house is situated, in which I now
(31) live; and to enable my son Alexander to build the house and kitchen as aforesaid, I will him my negro man Primus and a wagon and four horses for the term of ten years as aforesaid."

The testator lived about eighteen months after the date of the will, and, upon his death, Alexander took the negro and wagon and horses in his possession and had the use of them. He also built a dwelling house and barn on the east side of the creek and has posses-

sion of the house, in which the testator lived and the land attached thereto. William has had the use and possession of the land on the east side of the creek. The barn was built instead of the kitchen by agreement. The bill was filed after the expiration of ten years from the date of the will.

The plaintiff alleges, that the defendant has failed to build a good dwelling house, such as the testator intended, on the land on the east side of the creek; but on the contrary, has erected a log cabin not worth more than $125, and that the use of the negro, wagon and horses has been worth to the defendant $1000. He further alleges, that he has elected to take the land on the east side of the creek. The prayer is, that the defendant be decreed to account for the profits derived from the use of the negro, wagon and horses, and pay the same to the plaintiff and for general relief.

The defendant insists, that the house erected by him is a good dwelling house, worth $400, and avers, that it is such a house as was intended by the testator; he says, the value of the negro, wagon and horses is greatly overrated by the plaintiff, and alleges, that the land, which he has, is of much less value, than the land on the east side of the creek, and that he has always been willing and is now ready to give up the land assigned to him and take the land on the east side of the creek, according to the intention of the testator, if the plaintiff elects to do so.

We are satisfied from the evidence, that the house, which the defendant commenced building, would, (32) provided it had been finished in a workmanlike manner, and made comfortable, have been the sort of house that was intended by the testator; but it was left unfinished and the work put upon it was not at all suitable; it is not weather boarded, the floor, considering the materials and workmanship, scarcely deserved the name of a floor, and the inside work was not attempted.

The plaintiff is clearly not entitled to the specific relief prayed for. The testator does not intimate an intention, that he should have the value of the services of

the negro, wagon and horses in lieu of the house, but we think, he is entitled to the compensation, and has a right to such an amount in money, with interest from the expiration of the ten years, as would have been required to finish the dwelling house in a workmanlike manner, so as to make it comfortable.

The defendant is greatly in error, if he supposes he can refuse to build the house and keep the profits of the negro, wagon and horses, and acquit his conscience by offering to give up the land intended for him to take that of his brother. The testator intended to give the election to the plaintiff, after a suitable house was built by the defendant, and it is a fraud upon this intention to refuse to build the house and thus cheat the plaintiff out of the right of election given to him, after the property should be put in the condition directed by the will. There must be a reference to ascertain the amount that it would have cost to finish the house with good materials in a workmanlike manner, so as to make it comfortable.

PER CURIAM. Decreed accordingly.

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(33)

RACHEL STOKES & AL. vs. HAMILTON BROWN & AL.

A clerk and master is not entitled to any specific fee for issuing a subpœna for a witness to appear before him to give his deposition. For such service he is to be compensated as the Court may think proper.

This was a motion by Boyden in behalf of the plaintiffs for a re-taxation of the costs of the clerk and master below, the cause having been removed to this Court and compromised at this term. The Court directed the matter to be referred to the Clerk of this Court, who made the following report:

"The Clerk of this Court, to whom this cause was referred for re-taxation of the costs in the Court below begs leave to report: That the exception alleged is, that

there is a charge of one dollar to the clerk and master for each summons he has issued for witnesses to attend in the cause. This charge the Court believes to be wrong and that it ought to be struck out of the bill of costs.

"The charge is to be attributed to the wording of the Act of Assembly, allowing fees to the clerk and master, which gives one dollar for "each subpœna, writ or other process," which the clerk understands to refer to the process, by which defendants are brought into the Court of Equity, and not to a summons for a witness.

"The compensation for taking the testimony, in which is included the issuing of subpœnas, is embraced in the following words of the Act of Assembly of 1836, Rev. St., ch. 105, "for a report stating an account not exceeding fifty dollars," and the Act of 1842, ch. 50,
(34) authorizing clerks and masters to take depositions, sec. 2, "The clerks and masters shall be entitled, for taking depositions, to such compensation as may be allowed them by the Court, to which the depositions are returnable, to be paid as the Court may direct by either party or by both, in such proportions as the Court shall decree, to be taxed with and as part of the costs."

"All which is respectfully submitted.

JAS. R. DODGE, Clerk."

The report having been read, it was ordered by the Court that it be confirmed, and the costs be retaxed accordingly.

ANDERSON MITCHELL & AL vs. JOHN H. DOBSON & AL.

Where A. and B., as copartners, gave a note to C., and afterwards the copartnership of A. and B. was dissolved, B. agreeing to pay all the debts, and a co partnership was then formed between B. and C., *Held*, that this did not operate as an extinguishment of the note, unless it was so expressly agreed between B. and C. at the time their co partnership was formed, although it is alleged in the bill, that this note was to form a part of C.'s stock in the firm.

Cause removed from the Court of Equity of Wilkes County, at the Spring Term 1850.

Samuel F. Patterson and William H. Martin were partners and carried on the mercantile business in Wilkesborough, and, in September, 1839, they borrowed from Benjamin S. Martin, a brother of William (35) H., the sum of $300, for which they gave their promissory note. In January 1840, Patterson and Martin dissolved, and the latter undertook to pay all the debts of the firm, and Mitchell and the other plaintiff became bound with him in a bond to Patterson for the performance of the undertaking. In January 1841, William H. Martin and Benjamin S. Martin entered into articles of copartnership in a store in Wilkesboro', to be conducted by William H., under the name of William H. Martin & Co., and in a tavern in the same place, to be conducted by Benjamin S., under the name of Benjamin S. Martin & Co., and each of them was to put in stock to the amount of $3000; that of William H. to be in merchandise and that of Benjamin S. to be in money, each paying interest on any deficiency of his stock and sharing the profits and losses equally. The business continued until 1844, when the firm and each of the partners failed, and they both afterwards took the oath of insolvency, leaving a large amount of the debts of the firm unpaid. Before doing so, however, Benjamin H. Martin endorsed the note to his father, John Martin, in 1845, and the latter endorsed it, in trust for himself, to the defendant Dobson, who brought an action on it, against Patterson and the three Martins, and recovered judgment in 1847.

The bill was then filed against Dobson, the Martins and Pattersons, and alleges, that Benjamin S. Martin knew, that, by the contract between Patterson and William H. Martin, the latter was bound to pay the note of $300, and all the other debts of Patterson and Martin, and that the plaintiffs were his sureties therefor, and that with that knowledge, in 1841 he passed the said note, then over due, and the sum was named, as so much capital stock paid in by Benjamin S. The bill thereupon charges, that, inasmuch as William H. was to pay the debt, the same was thereby extinguished, and was so considered between those persons during
(36) the whole duration of the partnership; and that, afterwards, by a combination between the three Martins, with a view of reviving the note and raising the money from Patterson, and ultimately charging the plaintiffs upon their bond of indemnity to Patterson, the note was endorsed as aforesaid to John Martin in trust for his two sons or one of them, or without any valuable consideration, and then by him endorsed to Dobson, as before mentioned. The prayer is, that it may be decreed, that the debt was extinguished before the assignment of the note to John Martin, and that Patterson may be restrained from paying the judgment at law, and Dobson be perpetually enjoined from enforcing the payment thereof.

William H. and Benjamin S. Martin deny positively, that the note was paid in or received as a part of the stock of the latter in their partnership, or was in any manner paid or extinguished, or so conceived by them; and they say, that Benjamin S. Martin paid in his whole stock in cash raised by him from other sources; and John Martin denies, that he has any knowledge or belief to the contrary. They all state further, that the note was endorsed to John by Benjamin, in consideration of money to a much larger amount, paid by him, John, as the surety of Benjamin S. or of the firms of Benjamin S. and William H. Martin.

Boyden, for the plaintiffs.
H. C. Jones, for the defendants.

RUFFIN, C. J. Upon the evidence, the conclusion of the Court upon the points, on which the parties are at issue, would, probably, be, that the note of Patterson and Martin, though not indorsed to William H. Martin & Co. was transferred to the firm, as a part of the stock of Benjamin S. Martin, and, moreover, that the sums, which John Martin appears to have paid as the (37) surety of his sons, was in fact paid by the sale of property, which legally belonged to the sons, so as to prevent that from constituting a valuable consideration for the note. If the cause, therefore, depended on those points, the decree would, probably, be for the plaintiffs, especially as the argument of bad faith, in making the assignment to the father without consideration, is much fortified by the subsequent devises of suing in the name of Dobson, and making the persons, for whose benefit the suit was brought, parties defendant with Patterson. But the decree must be against the plaintiffs, because, upon their own showing, the case is against them in point of law. The bill does not allege, that the note was paid by Patterson and Martin, or either of them, to Benjamin S. Martin. On the contrary, it states that he paid it into the firm, as a subsisting note, in part of his stock: nor does it allege, that payment was made to the firm by the makers, nor set forth any facts from which actual satisfaction of the note to the firm by William H. Martin or afterwards can be inferred. It is not stated, even, that he paid in his own share of the stock, much less that he is now or ever was in advance of the firm. As far as appears, then, the debt is still justly due to the firm, and is much needed for the creditors, to whom, the bill states, this insolvent firm is indebted in a large amount. The bill, indeed, does not put the right to relief upon the equitable ground, that the debt had been once satisfied by payment, and therefore, that it was against conscience to raise the money a second time; but it rests upon a supposed extinguishment of the debt, by reason that William H. Martin had obliged himself to pay this debt, and he was one of the persons, as a member of the firm, to whom it was to be paid. Now that is a doctrine of the

common law, and might have put the firm to difficulty, as to an action on the note, if it had been endorsed. A Court of Equity, however, proceeds upon no such (38) principle of extinguishment, but the contrary one of relieving against it generally, when produced by the law; and hence, equity entertains suits between partners and charges each with what he justly owes, without regard to the form of security or its validity or invalidity at law. In this case, indeed, there was no extinguishment, as has been determined in the action at law; for the note was not endorsed to the firm, but stood in the name of the payee, Benjamin S. Martin, in trust for the firm, as we are now considering the question. The other partner, William H., could not extinguish it without the consent of his companion; since, it would be taking the effects of the firm, to satisfy his personal engagements to Patterson But it is not pretended that he attempted to do. Consequently, Patterson and Martin became equitably the debtors to William H. Martin & Co., upon this note, and ought to have been charged on their books as such, and the rights of the partner, Benjamin S. and the creditors of the firm, require that Patterson and Martin should now pay it, as it has not been done hitherto. If, indeed, the two brothers had agreed that the old note should be cancelled or considered paid, and that William H. Martin, by himself, should be the debtor to the firm for the amount and Patterson discharged, it would be different. But there is no evidence at all of such an agreement, nor is it charged distinctly, or otherwise than as legally to be inferred from the fact, that William H. Martin had bound himself to Patterson to pay this debt, an inference, already shown to be inadmissible. It is true, it may be said, that John Martin claims the note for himself, though he is not entitled to it, but holds it in trust for the firm, and, therefore, that William H. Martin has an interest in it, and to that extent the plaintiff ought to be relieved. But the bill is not framed with that view; for the interest of each partner can only be ascertained by taking an account of the partnership, and ascertaining the surplus, for division, after the

(39) payment of all debts—a thing that does not exist, according to the statements of the bill. The Court is obliged, therefore, to dismiss the bill, and, though reluctantly, with costs.

PER CURIAM. Decree accordingly.

GEORGE MOSTELLER vs. JOSEPH BOST.

Where two copartners give a bond to a third person, as between themselves each is considered in Equity as surity for the other, and, as such, is regarded as a creditor and has a right to all his privileges as one.

If A., one of the copartners, becomes insolvent, and B., the other partner, has to pay a debt from the firm, B has an equitable lien upon a bond, which he had given to A., before the commencement of the copartnership, and if A. assigns this bond to another person, the assignee is liable to the same equity, which B. had against A.

When a note or bond is assigned, after it becomes due, the assignee, though for valuable consideration and without notice, holds it, subject to all the equities, which the debtor has against the assignor.

The cases of *Williams* v. *Helme*, 36 N. C., 151, and *Little* v. *Marsh*, 37 N. C., 18, cited and approved.

Appeal from an interlocutory order of the Court of Equity of Lincoln County, at the Fall Term 1849, his Honor Judge Caldwell presiding.

Thompson, for the plaintiff.
Craig, for the defendant.

NASH, J. In the year 1842, the plaintiff, being indebted to to defendant, Jacob Bost, executed and delivered to him two several bonds, one for the sum (40) of $119, dated the 13th January of that year, and payable one day after date, and another for $206.25, dated the 6th of January, 1842, and payable the 1st of January 1843. In the Spring of 1844, the plaintiff and defendant, Jacob, entered into a partnership for making and vending a smut machine, the patent right

to which, they prchased from one L. D. Childs, and for which they executed to him, three bonds, each for $1000, payable six months after date: two of these bonds were discharged, jointly by the obligors, and the third by the plaintiff alone. The bill charges, that the defendant, Jacob Bost, for the purpose of avoiding the payment of his share of the last bond, given for the purchase of the patent right, and also the heavy losses incurred in the business in which they were engaged, transferred all his property to divers persons, and assigned over to the other defendant, Joseph Bost, the two bonds first mentioned, and dated the assignment as of the 21st of August, 1847—that the assignee took the bonds without paying any consideration, and with a full knowledge of all the above facts—and with a view to throw upon the plaintiff the payment of the whole of the judgment, obtained upon the third bond to Childs, upon which an execution was then issued—and the last payment, made by the plaintiff on it, was on the 4th of September 1847.

The bill further charges, that Jacob Bost has moved to the State of Mississippi, and is insolvent. The defendant, Joseph Bost, has sued the plaintiff on the two bonds, so assigned to him, taken out executions and threatens to levy on his property. The bill prays an injunction, &c.

The answer of Joseph Bost is filed the 20th of October 1848. It denies, that the assignment of the two bonds to him by Jacob Bost was antedated or without consideration or with any fraudulent intention. On the contrary, he avers, that the assignments were made on the day they were dated, and that he paid cash for them,

(41) and denies that he purchased with notice of any equity claimed by the plaintiff, or that he had any knowledge of the copartnership transactions, "but refers to the answer of his codefendant, when it comes in, in answer thereto, and as a part of his answer, and submits, whether if they be true, his rights are to be affected thereby."

The answer of Jacob Bost, the other defendant, is sworn to on the 6th of April 1849, and filed at the Spring term 1849, of Lincoln Court of Equity. This de-

fendant denies that he transferred any of his effects to defraud any of his creditors—and avers that the notes in question were transferred to his codefendant for a valuable consideration, and that in cash—that he owed Joseph Bost for money borrowed, with which he purchased a tract of land in Iredell County, which was afterwards sold by the sheriff, and purchased by the defendant, Joseph.

The plaintiff is clearly entitled to the aid of the Court, in restraining the defendant, Joseph Bost, from enforcing his judgment at law, at this time. By the purchase of the patent right of the smut machine and the agreement between the plaintiff and Jacob Bost, they became partners in the business of making and vending them. Great losses were sustained by the firm and many debts incurred, for which they were jointly and severally liable; all of which were paid by the plaintiff, as he alleges and not denied by the defendants.

Before entering into the partnership, Mosteller was indebted to Jacob Bost in the two bonds, the subject of this dispute, which were both assigned to the other defendant, nearly five years after they became due. One falling due on the 14th of January 1842, and the other the 1st of January 1843, and the assignment, as alleged by the defendant, was on the 21st of August 1847. By the bonds of one thousand dollars each, given for the purchase of the patent right, the plaintiff and defendant, Jacob Bost, were each a principal debtor to the obligee—but as between themselves, each was a
(42) surety for the other to the amount of one-half of the money due on the bonds. In equity, a surety, in respect to this liability, is regarded as a creditor and has a right to all his privileges as one. Here, the equity of the plaintiff arises from the inability to pay or insolvency of Jacob Bost. The right of the latter to assign the notes in question was lost, when he became unable to exonerate the plaintiff from the payment of the portion of the $1000 bond, for which the plaintiff was his surety and which he has paid. The debt, which Mosteller owed him, ought, in good faith, to have been retained by him as an indemnity in part of his loss. As

the notes then in the hands of Jacob Bost were liable to the equitable claims of the plaintiff against him, it would be contrary to just principles, that his assignee should be placed in a better position than he was; Williams v. Helme, 36 N. C. 151. Upon the insolvency of a principal, a surety may retain any funds belonging to him in his hands, and when he owes his principal, who becomes insolvent, and who assigns the debt for value, the surety may retain the amount against the assignee. *do.* 162. But the claim of the defendant, Joseph Bost, to enforce the collection of these notes out of the plaintiff is entirely untenable. When a note or bond is assigned after it falls due, the assignee over for valuable consideration holds it, subject to all the equities, which the debtor has against the assignor, and this upon the clearest principles of equity. The equity, which the debtor has, is prior to any acquired by the assignee. In this case the assignment was nearly five years after the note came to maturity. Whether, therefore, the defendant, Joseph, knew that the plaintiff had any equity against Jacob, is immaterial. He holds the notes as his assignor did. Upon another ground, the injunction ought not to have been dissolved. The answers are deficient in frankness and precision and are illusory. Little v.
(43) Marsh. 37 N.C. 18. It is charged in the bill, that the assignment was without consideration. The answers both state, that Joseph gave a valuable consideration, in cash -but neither of them state what was the amount of the consideration. Jacob says he had borrowed money from Joseph to purchase a tract of land, and which was subsequently sold under an execution against him. Joseph bought it. As to this fact (if it be one) the answer of Joseph is silent. He is content to say he paid for the notes in cash, and neither answer states at whose instance the land was sold by the sheriff, what was the amount of the debt, or what Joseph gave. Again, the bill charges the insolvency of Jacob or his inability to pay his debts. Neither answer replies to it.

We repeat, the answers are neither frank, full, nor precise, and are manifestly evasive.

The interlocutory decree below, dissolving the injunc-

tion, is erroneous. This opinion will be certified to the Court of Equity for Lincoln County, and the defendants must pay the costs of this Court.

PER CURIAM. Ordered accordingly.

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(44)

HUGH KIRKPATRICK vs. SAMUEL W. ROGERS.

A testatrix, in one clause of her will, devised as follows: "I will that all the balance of my property, not herein disposed of, be sold by my executors, and, after my debts paid, the proceeds of the sale to be divided into three divisions, one to A., one to B., and the third to be held by my executors for my negroes," &c. By another clause, she had directed her negroes to be emancipated: and it had been decided that the negroes and the fund given to them did not pass by the will, but fell into the residue: it was now held that these negroes and the property bequeathed to them constituted the primary fund for the payment of debts.

It is the general rule, that independent of any intention of the testator, and without any particular charge on it, the law throws the burthen of paying the debts on property, as to which there is an intestacy, unless there be an exception of it, or a charge of the debts, &c., be fixed, by plain words or implication, on other property exclusively.

A mere charge of debts on a particular part of the estate will not exonerate a fund, on which there is a prior liability; for the charge may as well be taken, as making that fund auxiliary, as intending to place it in front.

There must be something to change the order, in which, the law says, the different parts of the estate are applicable, when the testator does not direct otherwise.

The cases of *White* v. *Green*, 37 N. C., 35; *Wortham* v. *Robards, Id.*, 173; *Fraser* v. *Alexander, Id.*, 348, and *Dickson* v. *Cotton*, 22 N. C., 272, cited and approved.

Cause removed from the Court of Equity of Mecklenburg County, at the Spring Term 1850.

The bill is to obtain a construction of the will of Anna Boyce. After the cause between these parties was heard in August 1849, 41 N. C., 130, a question arose between the executor and the residuary legatees and next of kin, out of what funds the debts of the testatrix and
(45) the charges of the administration are payable. The will in the sixth clause gives a certain fund

to the slaves of the testator, and then in the eighth clause proceeds thus: "I will that all the balance of my property, not herein disposed of, be sold by my executors, and, after my debts paid, the proceeds of the sale to be divided into three divisions. One third to go to the use of the Associated Reformed Church at Sardis; one third to be equally divided among my brothers and sisters' children: the remaining third of the proceeds of sale, to be held by my executor for my negroes." &c. When the cause was formerly before the Court, it was held, that the slaves and the funds given to them in the sixth and residuary clauses did not pass by the will; and the executor, considering that they constituted the proper fund for the payment of debts and charges, as being a surplus not disposed of, was proceeding to administer the estate on that principle, when he was forbidden by the next of kin, who insisted that the same was payable out of the residue given in the eighth clause; and thereon the executor now prays directions.

Osborne and *Wilson*, for the plaintiff.
Johnson and *Thompson*, for the defendants.

RUFFIN, C. J. The Court is of opinion, that the undisposed of surplus is liable in the first instance for the debts and expenses. It is the general rule, that, without any particular charge on it, and independent of any intention of a testator, the law throws the burden on property, as to which there is an intestacy, unless there be an exception of it, or a charge of the debts, &c., to be fixed by plain words or implication, on other property exclusively.—White v. Green, 37 N. C. 45. There is no direct exemption of this surplus; and the only question is, whether there is such a charge on the residue given in the will, as fixes that with the bur-
(46) den exclusively and exonerates the surplus. A mere charge of debts on a particular part of the estate will not exonerate a fund, on which there is a prior liability: for the charge may as well be taken, as making that fund auxiliary, as intending to place it in front. There must be something to change the order,

in which, the law says, the different parts are applicable, when the testator does not direct otherwise. Wortham v. Robards, 37 N. C. 173. A direction to sell the residue, and then, that the money thence arising should be disposed of as follows, viz: All my just debts be paid; and then to A. and B. $50 each, and all the balance to C. was held in Fraser v. Alexander, 37 N. C. 348, to be a precise division and appropriation of that fund to those purposes, and that, as C. was only to have the balance of the "money thence arising," he could only get what remained of that fund, after the other purposes had been answered out of it. But there is no such precise direction in this case, nor any thing more than simply a recognition of the charge of the debts, imposed by law on the residue of her estate, which she knows and says must paid before the donees of the residue can have it. There is no declaration, that the debts are to be paid, at all events, out of the residue thus given, but a charge merely, which expresses no more than the law would, had the will contained not a word on the subject. Upon such a case, besides the authorities already cited, Dickson v. Cotton, 22 N. C. 292, is directly in point, that the other parts of the estate, thus charged, are not liable, but upon a deficiency of an undisposed surplus. A declaration must be made accordingly; and the executor will pay the costs of this suit also out of the fund, which will be allowed in his accounts.

PER CURIAM. Declared accordingly.

(47)

B. S. BLANTON vs. E. G. MORROW.

In order to pass a title to the interest of a remainder-man in personal property, sold under execution, it is necessary that the property should be present at the sale.

The sheriff, who has an execution against a remainder-man, has a right to seize the property in possession of the tenant for life and bring it to the place of sale.

The cases of *Hardy* v. *Jasper*, 14 N. C., 158; *Knight* v. *Leak*, 19 N. C., 133, and *McDowell* v. *Pearce*, 9 N. C., 110, cited and approved.

Appeal from the decree of the Court of Equity of Rutherford County, at the Spring Term 1850, his Honor Judge Caldwell presiding.

Stith Mayes devised and bequeathed certain real and personal estate to his wife for life, and then over to his son, James F. Mayes, and nine other children, equally to be divided among them. A part of the personal estate consisted of fourteen slaves, and, during the life of the widow and while she was in the enjoyment of the property under the will, James F. Mayes sold and assigned all his interest in the slaves and other parts of the estate to E. G. Morrow on the 8th of November 1836. In September 1844, Hiatt McBurney recovered a judgment against the said Morrow, and, in December 1847, a *fieri facias* was directed and delivered to the sheriff of Cleveland County, who, on the 13th of March 1838, offered for sale under it "the defendant E. G. Morrow's interest in the estate of Stith Mayes, consisting of fourteen negroes," when B. L. Blanton became the purchaser at the price of $250. At the time of the

(48) sale no one of the negroes was present, but eight of them were in South Carolina or in Rutherford County, and the others were in the possession of different persons in Cleveland, to whom they had been hired by the tenant for life; but the sheriff made known their number correctly, and described them as being "men, women and children." Mrs. Mayes died in April 1848, and, in August following, a bill was filed by some of the children of Stith Mayes, against the others and against Morrow and Blanton, for a division of the es-

tates, real and personl, or a sale thereof and a distribution of the proceeds. By consent of all parties, a sale was made for the purpose of partition; and it was agreed by Blanton and Morrow, that the question of right, as between them, should be determined by the Court, upon the facts to be ascertained upon an enquiry. It was accordingly referred to the master to enquire into Blanton's title, under the purchase from the sheriff, and upon the report the case appeared to be, as above stated. Upon consideration of it, the Court was of opinion, that Blanton's purchase was void, and that the title of the share of the slaves continued in Morrow, and decreed that one tenth part of their proceeds, as well as of the other parts of the estate, should be paid to Morrow, but allowed Blanton to appeal.

J. G. Bynum, for the plaintiff.
J. Baxter, for the defendant.

RUFFIN, C. J. The only question is, as to the effect of the plaintiff's sale, and upon that the Court concurs with his Honor, that it did not divest the title of Morrow. It is so, beyond doubt, as to the slaves, which were not in the sheriff's county; for the execution did not creat a lien on them, nor affect the debtor's right to dispose of them.—Hardy v. Jasper, 14 N. C. 158. The cases cited in the argument of Knight v. Leake,
(49) 22 N. C. 133, and McDowell v. Pearce, 9 N. C. 110, show, that it is the same, with respect to those, which were in the county. For although such a vested interest, as Morrow had in these slaves, is liable to be sold under execution, yet the other cases establish, also, that this forms no exception to the general rule, that personal property, sold under execution, must be present, in order to render the sale valid.

That is all which it is necessary for the Court to say, for the purposes of this cause. But it seems to be proper, in order to avoid embarrassment to officers and to prevent doubts, as to the proper course to be pursued in such cases, that it should be added, that the Court is of opinion, that, from the necessity of the case, the tenant

of the particular estate must submit to the inconvenience of producing the slaves at the day and place of sale, or, if that could not be satisfactorily arranged between the tenant and the sheriff, to the further inconvenience of a seizure by the sheriff for the purposes of securing the property and making the sale. That result from the two propositions, that the remainder or reversion is subject to execution, and that the thing itself, in which such an interest is vested in the debtor, must be present when it is sold. That course, it is believed, has been generally, if not universally, observed. It stands on the same principle, on which the sheriffs seize the share of a tenant in common on a *fieri facias* against him alone. There is, therefore, no error in the decree, and it must be so certified; and Blanton must pay the costs in this Court.

Per Curiam. Ordered and decreed accordingly.

Approved. Post, 70.

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(50)

CHARLES McDOWELL & AL vs. A. H. SIMS & AL.

Where an injunction has been dissolved and the money has been collected by an execution at law, and paid into the Court of law, the Court of Equity will, upon proper affidavits, direct the money to be paid into the office of the Clerk and Master of the Court of Equity; and where the interests of the plaintiffs at law are several, the Court will direct, that the parts belonging to those, who are insolvent or removed out of the State, shall not be paid to them until they have given bond and security respectively, that they will refund the money, if the Court of Equity shall ultimately make a decree in favor of the plaintiffs in equity. And if the said bonds shall not be given after due notice, the Clerk and Master of the Court of Equity shall lend out the money upon bond and good security, to be subject to the future orders of the Court of Equity.

Appeal from an interlocutory decree of the Court of Equity of Rutherford County, at the Fall Term 1849, His Honor Judge Ellis presiding.

N. W. Woodfin, *Bynum* and *Iredell*, for the plaintiffs.
Avery, for the defendants.

PEARSON, J. After the order, dissolving the injunction, was affirmed in this Court, 41 N. C. 278, the plaintiffs paid the money into the office of the Superior Court of Law for Rutherford County, and filed an affidavit in the Court of Equity for the said County, setting forth that Sims, one of the plaintiffs at law, is possessed of little property, and is not worth more than his debts; Jefferson, the other plaintiff at law, has left the State and removed to Arkansas, and has no property in this State; and "the greater number of the heirs at
(51) law are non-residents of this State, and affiants believe that they all are, except A. H. Sims, John Cowan, and John Price and wife, and they are informed and believe that Price is worth little property if any thing. The affiants therefore believe, that, unless the defendants in equity, the plaintiffs at law, are required to give bond and security for the return of the money and interest in the event that the affiants on the final hearing shall have a decree in their favor, they will realize nothing by the decree, which they hope to obtain." Whereupon, it was ordered that the Clerk of the Superior Court of Law of Rutherford County retain the money paid in on the two judgments in that Court, until the plaintiffs at law file bond and security in the sum of $4000 "conditioned for the repayment of the money and interest whenever so decreed by this Court." As a condition precedent to this order, the plaintiffs were required to give bond and security in the sum of $1000 to indemnify the plaintiffs at law against any loss of interest by the retention of the money, if a decree should not be made in favor of the plaintiff, and the defendants were permitted to appeal.

The power of this Court to make such orders, as may be necessary to secure to the plaintiffs the fruit of decrees in their favor, is beyond question.

In ordinary cases, this object is attained by holding the defendats to bail and such is the general course in Courts of law, except in the action of replevin. But

where there is a trust fund, Courts of Equity are not content with bail simply and deem it right to seize the funds by a writ of sequestration, or put it into the hands of a receiver; where the equity is, to prevent the unconscientious use of a legal right, the course is to restrain the party by an injunction until further order, and upon the coming in of the answer, the injunction is either continued until the hearing (in which case the plaintiff is amply secured) or is dissolved, as was
(52) done in this case, which leaves the plaintiff without any security, for he has not even that of a bail-bond, and in this latter case, upon a proper foundation being laid, the Court will in its discretion, provide for the security of the plaintiffs; but the power ought to be exercised sparingly and in a way to interfere as little as possible with the rights of the defendants, for there are these two presumptions against the plaintiffs, one growing out of the judgment at law, the other out of the decretal order, dissolving the injunction. Still, as he may entitle himself to a decree on the final hearing, if he can show that there is danger, on account of the defendants being non-residents, or of their being insolvent, that such decree will not be satisfied, he is entitled to the aid of the Court in providing a proper security, and the question is, what that security ought to be? For the defendants it is said, that this is not a trust fund, and if the bill had been filed without praying for the injunction, the plaintiffs' security would have been a bail-bond; and as the injunction is dissolved, the case stands as if none had issued, and the plaintiffs have no right to ask to be put in a better condition, by requiring the defendants to forego the present enjoyment of the money, instead of a bail-bond. The reply is, it is true this is not a trust fund; but the fund is now within the control of the Court; it has not yet reached the hands of the defendants, and although, in ordinary cases, bail is the only security required, it is not because that is deemed the best or even satisfactory security, but because it is not in the power of the Court to provide any better. Whereas, when the fund is in Court, there is no reason, why the plaintiff should not have the best and

most satisfactory security, "to-wit," that the fund be retained or bond be given for its repayment. This seems to be a sufficient answer, and such has been the practice in Courts of Equity in this State, Clark v. Wells, 6 N. C. 3. In the present case, the Court below erred in several particulars. It was erroneous to require
(53) the Clerk of the Superior Court of Law to retain the funds; for, admitting his liability upon his official bond for the safe keeping of the money, and to say nothing of the loss of interest, the proper course was to require the plaintiffs at law, to take the fund from the Court of Law and bring it into the Court of Equity, so as to put it under the control of that Court, where the necessary orders for its safe keeping and lending it out at interest, &c. might be made. It was erroneous to require a bond of $4000 to be filed, before any of the parties were at liberty to draw their respective shares, as the fund was not a joint one, but was held by the plaintiffs at law in trust for the heirs, whose land had been sold and who were entitled to shares of the money respectively. As to Cowan, who is entitled to a share, no foundation was laid to require a bond for its return, and there was no reason why he should not have been allowed to receive it. As to Sims and Price, it may well be questioned, whether there was sufficient foundation laid to prevent either of them from receiving their respective shares. The plaintiffs do not state, that they have any personal knowledge of their pecuniary condition, or set out from whom they received information, or show any ground for their belief, but simply say, they are informed and believe, &c. We express no opinion on this point, as the necessary proof may be made at the next term of the Court below.

There is another ground of objection to the order requiring bond for the return of the entire fund. The plaintiffs allege in their bill, that the land is not worth $2000, but admit that it is worth $400 or $500. Now to this amount, according to their own showing, they have ample security and the order should only have extended to the respective shares of the several heirs (who were shown to be non-residents or insolvent, or so nearly

so as not to be responsible,) in the fund, after
(54) deducting the present value of the land. This opinion will be certified to the Court below, with directions to reverse the orders appealed from, and to make such orders as the parties may show themselves entitled to in conformity to this opinion. No costs are given in this Court.

PER CURIAM. Ordered accordingly.

CASES IN EQUITY

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF NORTH CAROLINA,

AT RALEIGH.

DECEMBER TERM, 1850.

JACOB A. McCRAW & AL. vs. HUGH GWIN & AL.

Where a bond has been given for the conveyance of land, and the administrator of the obligor, after his death executes a deed for the land, by virtue of our Statute, any equitable defence against the bond may be set up against the deed, which rests upon the bond.

Where a deed is assailed on the ground of fraud, and the allegation is not made good, plaintiffs are not in general allowed to fall back upon any secondary equity; and they are never allowed to do so, unless such secondary equity is distinctly set out in the bill and relied on as an alternative, so as to give to the defendant full notice, and an opportunity to meet the bill in both its aspects.

Cause removed from the Court of Equity of Surry County, at the Fall Term 1849.

Morehead, for the plaintiffs.
Miller, for the defendants.

(56) PEARSON, J. Jacob McCraw died in 1815, leaving a will; by which he devised the tract of land, set out in the bill, to his wife for life, with remainder to his two sons, James and Samuel McCraw, as tenants in common. In June 1817, Samuel McCraw executed a bond to James in the penal sum of $2,500 to convey his half of the land to the said James. Samuel died intestate and without issue in 1817. James died in 1826,

leaving a will by which William Davis was appointed his executor, and leaving many children, who with the said Davis and Gwin, are the defendants. In 1836, the widow died; and the bond for title was then proven and registered, and Davis administered upon the estate of Samuel McCraw, and made title under the bond to the children of James, who sold and conveyed the one-half of the land to the defendant, Gwin, who had before, as a purchaser under a deed of the said James to certain persons in trust, become the owner of the other half.

The plaintiffs, together with the children of James McCraw, are the heirs at law of Samuel. They allege, that, at the time the said Samuel executed the bond for title, and before, and afterwards up to his death, he was a beastly drunkard, and had become imbecile and totally incapable of transacting business of any kind: and that, taking advantage of his helplessness and want of capacity, his brother James induced him to execute the bond for title, and "defrauded him out of his land without any, or if any, but a small, consideration."

The prayer is, "that this Court will declare and decree, that the plaintiffs recover their interest, according to their respective rights, in said land."

The defendants admit, that in 1819 Samuel McCraw was very intemperate; and they admit, that in 1817 he would sometimes get drunk, but they deny, that, during that year, he was incapable of attending to his business. On the contrary, they allege, that he was
(57) fully capable of doing any kind of business, and was a man of good sense and ability. They allege, that, at the time he executed the bond for title, in pursuance of a previous contract, he was entirely sober and competent to do business. They deny, that the land was obtained from him by fraud and without any, or but a small consideration. On the contrary they allege that the price agreed on was $1250 which was the full value, as it was encumbered with a life estate; that, at the time the bond was executed, a part of the price was paid and the balance was secured by the notes of James McCraw, which he then executed and delivered to Samuel, and which he afterwards satisfied, although they

admit, that after the lapse of so many years, they are not able to produce the bonds, which, they suppose, were not taken care of after being paid and cancelled.

If the bond is void on account of the alleged fraud, we do not think the deed executed by Davis, the administrator, under the power vested in him by the statute, would stand in the way of the plaintiffs and prevent them from setting up their original equity; for the power to make titles rests on the bond, and, if that fails, the title must fail.

For this reason we have examined the proofs, which are very voluminous on both sides, to see if the allegation of the bill is sustained, and we are satisfied, that, so far from being sustained, it is wholly disproved. William Davis and Martin Cloud, the two subscribing witnesses, both swear, that, at the time Samuel McCraw executed the bond, he was perfectly sober and capable of doing business; that the consideration agreed on was $1250, which was a fair price; that the part was then paid by the satisfaction of a debt, which Samuel owed to the witness, Cloud, and also a debt due the witness Davis, and that the balance was secured by notes, which James then executed in pursuance of the contract.

(58) These witnesses are fully sustained by the weight of the evidence as to the capacity of Samuel, who did not become a confirmed drunkard until some time after the year 1817, and who spoke of the contract to several of the witnesses and expressed himself satisfied

When a deed is assailed on the ground of fraud, and the allegation is not made good, plaintiffs are not in general allowed to fall back upon any secondary equity—Adams on Equity, 164, (176,) and they are never allowed to do so, unless such secondary equity is distinctly set out in the bill and relied on as an alternative, so as to give to the defendant full notice and an opportunity to meet the bill in both of its aspects.

Per Curiam. Bill dismissed with costs.

WILLIAM POWELL & AL. vs. DAVID P. McDONALD & AL.

C., a woman, was entitled to a legacy of a life estate in two-thirds of a certain undivided number of slaves, and sold part of them and with part of the proceeds purchased a house and lot. She afterwards married B., who released his interest in the house and lot to the legatee of the other undivided third of the slaves, and received a portion of the amount due for the price of the slaves sold by his wife. B. then conveyed his interest in the "house and lot" to a trustee to secure creditors: *Held*, that, as B. had not elected to take the house and lot as a part of his wife's legacy, the deed to the trustee for creditors passed no title, legal or equitable.

Cause removed from the Court of Equity of Richmond County, at the Fall Term 1850.

(59)

Strange, for the plaintiffs.
No counsel for the defendants.

PEARSON, J. The facts appeared to be these. One Green died in 1831, domiciled in the State of South Carolina, leaving a will, by which he bequeathed to his wife, Hannah, one third of the hires of his negroes during her widowhood, and to his daughter Margaret "the use of all of his property," (subject to the bequest to his wife before given,) "during her natural life, and at her death to the heirs of her body, share and share alike, but if she dies without leaving issue, then to his brothers and sisters." The executors named did not qualify, and the widow was appointed administratrix with the will annexed. There were nine negroes, and in 1833 she sold some of them to one Sparkman for $1200, and took his bonds therefor with interest payable annually. In January 1839 she removed with her daughter to Rockingham in Richmond County, and at the end of that year purchased from one Leak a house and lot in said town for $1500, which she paid out of a payment made to her by Sparkman on his bond for the negroes, and took a deed to herself in fee simple. In October 1840, Margaret married the defendant McDonald, and in November of that year, McDonald executed to the said Hannah Green a release of all his right and claim

to the said house and lot. In 1841 the said Hannah Green intermarried with the defendant, Zimmerman; and in 1843, they removed from Rockingham and left McDonald and his wife in possession of his house and lot. In 1841—42—43, Mrs. Zimmerman received from Sparkman $1,351.72, which she paid over to McDonald. In 1845 McDonald executed a deed to the plaintiffs, whereby he conveyed to them all his estate, interest and claim to the said house and lot, "both at law and in equity," in trust to indemnify them as his sureties.

(60) Mrs. Zimmerman has an account against her daughter, Margaret, for expenses in her maintenance and education, &c., for nine years, amounting to about $3000, over and above her share of the hires of the negroes and the interest on the bond of Sparkman. This account the defendants, McDonald and wife Margaret, admit to be just, as the said Margaret had been a sickly child, and the medical bills and contingent expenses on her account had been very large.

The plaintiffs by their bill insist, that Mrs. McDonald was entitled to an absolute estate in the slaves, under the will of her father; and as the slaves were sold by the administratrix and the proceeds invested in the house and lot, she was entitled to the house and lot; and as she has children by her husband, he is entitled as tenant by the curtesy initiate to a life estate, and, by his deed in 1845, his estate was assigned to them. The prayer is, that "the defendants may be decreed to convey to the plaintiffs such legal estate as they may be entitled to, and that they may have immediate possession thereof, and an account of the profits," &c.

The defendants admit the facts as above stated; but they allege, that the defendant, Mrs. Zimmerman, purchased the house and lot from her son in law: that upon the intermarriage of the defendant, McDonald, with the defendant Margaret, he, by way of making his election to hold on to the right of his wife in the negroes or the proceeds thereof, as invested in the note of Sparkman, executed a release to all claim in the house and lot, and, afterwards, before he made the deed to the plaintiffs in 1845, received some $1300 of the principal of the bond

of Sparkman, which, taking into consideration the amount due for and on account of the expense of maintaining and educating his wife, was much more than was due, if she was only entitled to receive the profits during her life.

(61) It is proven by the deposition of two gentlemen of the bar in the State of South Carolina, that, by the law of that State, Mrs. McDonald was only entitled to a life estate, and her children take the remainder as purchasers. So, the defendant, McDonald, was only entitled to the profits during the coverture: and he, at his option, had a right, perhaps, to follow the fund in its altered form. Adams' Doctrine of Equity 144. But so far from making his election to follow the fund in its altered form, he expressly waived all such right, long before he made the deed to the plaintiffs, by his release or by his reception of $1300 of the original fund, after its conversion into the bond of Sparkman.

The deed to the plaintiffs passes the right and interest of McDonald in and to the house and lot. He had no right or interest, and, of course, the deed passed nothing. If the deed had passed all of McDonald's right and interest in and to the estate of his wife's father, the plaintiffs would have been entitled to an account. As it is, the bill must be dismissed with costs.

PER CURIAM. Decree accordingly.

(62)

WILLIAM D. MOYE vs. JAMES C. ALBRITTON.

If an administrator gives a preference to a creditor, who is not entitled to it, he commits a devastavit, and is chargeable for the same assets to another, whose debt is of higher dignity, or whose diligence gives him priority; and this, though it may have been done through an honest mistake. And the rule is the same in equity, in this respect, as at law.

Where A. and B. were cosureties on a bond of C., and C. died and A. administered on his estate; and then B., in a suit against A., as administrator, recovered the amount of a debt due to B. by the principal, A.'s intestate, and fixed him with assets upon the ground that A. had paid the debt to C. voluntarily, while B.'s suit was pending; and A. alleged, in a bill of injunction, to restrain B. from collecting his judgment and for contribution, that he had no assets of his intestate out of which he could pay the debt to C., but that he paid the same out of his own funds, which was denied by B. in his answer; *Held*, that the Court could not determine the question of contribution, until an account of the administration of A. should be taken, and for that purpose a reference be had, and the injunction continued over.

Appeal from the Court of Equity of Pitt County, from an interlocutory order made at the Fall Term 1850, his Honor Judge Bailey presiding.

The following case was presented by the bill and answer.

The plaintiff and the defendant were cosureties for Archibald Parker, in a bond payable to John S. Daniel for about $600. Parker died intestate in October 1847, and the plaintiff administered on his estate in November 1847. The estate was not sufficient to pay the intestate's debts, including the land—which the plaintiff sold under a decree for the payment of debts.

(63) Among the debts of the intestate were two on bonds to the defendant; on which he brought suit to February Term 1848. The plaintiff claimed therein nine months to plead, as allowed by the statute. In July 1848 the plaintiff paid the debt to Daniel—then amounting to $624.05, without suit; and he took a receipt therefor, purporting to be given him as administrator. In August following, the plaintiff, being then obliged to plead in the actions, put in plene administravit and retainer; and they were afterwards found against the plaintiff, and judgments recovered for $300.61. On

the trial the plaintiff exhibited his administration account and it thereby appeared that the assets of both kinds amounted to the sum of $5,781.31 and that the disbursements and commissions allowed amounted to $6,242.09: thus leaving a balance due to the plaintiff of $460.78. Among the disbursements, however, were the payment to Daniel and some previously made in the same manner to other persons, making an aggregate of $837 18. The defendant objected to them, because they were made voluntarily after his suit brought: and they were rejected by the Court. That made a balance on the administration account appear against the present plaintiff, somewhat exceeding $300: and accordingly the judgment at law were rendered, as before stated.

The bill states further, that the plaintiff made the payment to Daniel under the belief, that he had a right to prefer that debt, notwithstanding the defendant and others had brought the suits, in which he had not pleaded: and that, in fact, the payment was made with the intestate's assets to the amount of $149 only—being in a bond for that sum, which he had taken as administrator for a part of the real estate sold—and as to the residue, with the plaintiff's own funds. The bill further states, that the administration account, produced on the trial at law and exhibited with the bill, is just and true, as to the amount of the assets and the disburse-
(64) ment thereof: and, inasmuch as the suits brought against him bound the assets in law, that there were no assets legally applicable to the debt to Daniel: and that in truth the whole debt to Daniel was discharged out of the plaintiff's proper money, and that the receipt was taken to him as administrator through a mistake upon that point. The bill then charges, that, as in point of fact the plaintiff has accounted for all the assets of the intestate and paid this debt out of his own funds, the payment is in law regarded as having been made by him, as one of the sureties in the bond: and, therefore, that he is entitled to have from the defendant contribution of a rateable part thereof, namely, $312.02½ with interest thereon, and had requested the defendant to discount therefrom the sum of $300.61,

so recovered by him at law; but that the defendant refused to make such discount or contribution, and has issued writs of fieri facias de bonis intestati, and upon a return of nulla bona thereon he has sued out writs of fieri facias to obtain executions de bonis propriis. The prayer is, that, if necessary, an account may be taken of the intestate's estate, and that the defendant may be declared liable to contribute equally to the satisfaction of Daniel's debt, by paying one half thereof to the plaintiff or acknowledging satisfaction of his judgments at law, and, in the meanwhile, for an injunction against suing out executions de bonis propriis.

On the bill an injunction was awarded as prayed.

After admitting the insolvency of the intestate and that, on the defendant s objection, as mentioned above, the plaintiff s vouchers to the amount stated has been rejected at the trial, and that thereby a balance of assets appeared to be in the plaintiff s hands sufficient to satisfy the debts to the defendant, the answer states, that, by establishing such balance of assets, the defendant answered his purpose at that time, and did not think it then necessary to make further objection to the account.

But it further states, that the defendant be-
(65) lieves, that the account was not correct, and that the plaintiff had assets to pay the debt to Daniel as well as those to the defendant, and that the payment to Daniel was made in the assets of the intestate; and, moreover, it insists, that the plaintiff is concluded by the form of the receipt taken by him as administrator. It states, also, that, in 1846, the intestate gave to the plaintiff, who was his son-in-law, a negro, which he afterwards sold for $600, and that the debts to the defendant and also debts to other persons, now remaining unpaid, had then been contracted, and that the intestate did not retain property sufficient and available for the satisfaction of those debts; so that the gift of the slave was fraudulent and void as against the defendant, and the plaintiff is chargeable for the value of the slave as assets; and that, if he were thus charged, these would be enough to pay both Daniel and the defendant. The answer further states, that, at the plaintiff's sale, the

defendant purchased a piece of land at $142, and gave his bond therefor, and that the plaintiff passed the same away and the defendant had been compelled to pay it, though he had not been able to get possession of the land, for the reason, that the intestate had not title to it; and it insists, that the defendant ought to be allowed therefor out of any sum in which he may be found liable to the plaintiff.

On the answer the defendant moved for a dissolution of the injunction; which was refused, and he appealed.

B. F. Moore, for the plaintiff.
Biggs, for the defendant.

RUFFIN, C. J. It would seem, that it was intended to raise an equity for the plaintiff, founded on his mistake in applying the assets to a debt, which he could not in law prefer to those of the defendant and others, then in suit. Some such idea obscurely appears in the (66) bill. But no relief could be given on that principle. If an administrator give a preference to a creditor, who is not entitled to it, he commits a devastavit and is chargeable for the same assets to another, whose debt is of a higher dignity, or whose diligence gives him the priority. He therefore applies the assets at his peril in that respect. And it is the same in equity as at law; for, it is not against conscience, that the defendant should insist on his legal priority, and he should have the benefit of the assets which were properly applicable to his satisfaction. However honest the plaintiff's mistake may have been, still he made a misapplication of the assets, and therefore cannot throw the loss on the defendant.

The bill, however, states another ground for relief and for the injunction, which appears to the Court to be a good one in itself, and not to have been sufficiently answered; which is the liability of these parties, as co-sureties, to contribute equally to the debt to Daniel. It is admitted that the principal did not leave property sufficient to pay his debts and that the plaintiff paid this debt. The only other point material to the question

of contribution is, as to the fund, out of which the payment to Daniel was made and ought to have been made. If at the time the plaintiff paid the debt he was bound or at liberty to discharge it out of the assets of the principal, he ought not to have contribution from the defendant, since he had in his own hands the means of saving harmless both himself and the defendant, and the principal, in truth, could not, to this purpose, be deemed insolvent. On the other hand, if, at that time, he had no assets applicable to the debt, that is, liable in law therefor, so that, as administrator, he might then have been charged therewith in an action by Daniel, it would seem manifestly unjust, that, as cosurety, he should be liable for more than a moiety. He was not bound to pay that debt instantly upon
(67) administering, in order to found a claim for contribution from his cosurety; but was entitled to a reasonable time to convert the property into money for that purpose. He could not compel the creditor to bring a suit, so as to enable him to confess a judgment and thereby appropriate the assets to this in preference to other debts in suits. If, therefore, before he had the means of payment in hand, or before he could confess judgment for this debt, other creditors tied up the assets by bringing suits, so that he could not legally appropriate to Daniel's debt, it is the same, for the purpose of the present question, as if there had been no assets at all—since it was not the plaintiff's fault, that he did not apply them in discharge of this debt, but he was prevented from doing so by the law itself, which makes a suit brought so attach upon the assets, as to render a voluntary payment of another debt in equal decree or devastavit. How, then, is it to be understood in this case, the assets stood at the time of the payment to Daniel? It is to be noted, that, upon the trial at law, the plaintiff was content to take a credit for this sum as a disbursement of the assets, and so stated it in his administration account; and that, thus stated, the assets would be exhausted and nothing left to answer the defendant's demand. The defendant then objected that the assets, thus applied by the plaintiff, were bound to

him by his prior suit, and he succeeded on that ground in having that credit struck out of the account. That does not, indeed, prevent the defendant from showing, now, that there were assets applicable to Daniel's satisfaction. For, the point on the trial was, whether it was not a devastavit, as against the plaintiff at law, even if the payment to Daniel was made out of the assets, and the creditor was not called on to go further. But when the plaintiff claims contribution, as between cosureties, it is open for the defendant to allegeth at the principal left assets, with which the plain-
(68) tiff, as his administrator, might and ought to have paid the debt The question is, how the fact is in that respect. And upon the circumstances stated, the Court thinks that it is prima facie to be understood, that there were no assets for that purpose. According to the account exhibited, connected with the judgments obtained by the defendant, there were none; and the bill states explicitly that there were none, and that the account is just and true. The answer does not dispute a single item in it. It does not allege, that the payment of any one of the debts was improper, saving only that the voluntary payments were erroneous, as against his prior suit; or that the plaintiff ought to have paid Daniel before he paid any of the other debts, mentioned in the account. Without entering into any particulars, the defendant merely states in general terms his belief, that, after paying his judgments, there are assets sufficient to pay Daniel. But such a general statement cannot overthrow the positive and precise allegations of the bill, accompanied by the account. In support of his belief, the defendant adduces one allegation of fact and one only: which is, that the intestate fraudulently gave the plaintiff a slave which thereby became assets. But that does not answer the plaintiff's case, so as to require the dissolution of the injunction. The answer is not on that point responsive to the bill: but brings forward new matter in avoidance of the plaintiff's prima facie case. Besides, the answer does not profess to state this as a thing within the defendant's own knowledge. For those reasons it is proper to re-

serve the consideration of that question, until the parties can enter into proofs, upon the hearing or before the clerk in taking the account. In fine, it is apparent that the Court cannot make a decree with any confidence of its justice, until, by an account, it can be ascertained,
(69) whether there were in the hands of the plaintiff assets of the intestate applicable to the payment of Daniel to any and what amount. Prima facie it is to be taken, under the circumstances, that there were not, and therefore that the defendant is chargeable to the plaintiff for the moiety of the debt. While thus apparently chargeable, he ought not to coerce from the plaintiff personally the payment of his judgment at law, instead of letting one of the demands stand against the other.

The alleged defect of title to the land purchased by the defendant cannot affect the question. The defect is not sufficiently stated. If it were, it cannot be presumed, that the plaintiff made himself liable for the title, or knew of the defect before he disposed of the bond for the purchase money in the course of administration as stated in the administration account, on which the defendant fixed him with the assets, in respect of which, in part, he took his judgent.

There was, therefore, no error in the order appealed from.

PER CURIAM. Ordered to be certified accordingly.

Approved. Coggins *v.* Flythe, 113 N. C., 113.

(70)

JOHN McLERAN vs. ALFRED A. McKETHAN & AL.

A testator bequeathed to his sons as follows, "I give and bequeath to my sons A., B., C. and D., and their heirs, 440 acres of land lying, &c., my two negroes, &c., all of which I wish sold and the proceeds to be equally divided among my said four sons, &c., after my funeral expenses and debts have been paid out of the same. *Held*, that the sons did not take such an estate in either the land or negroes, as was subject to execution or attachment, but they were only entitled to divide the proceeds of the sale of the property, which the executor was directed by the will to make.

The cases of *Blanton* v. *Morson*, *ante*, 47; *Dunwooddie* v. *Carrington*, 4 N. C., 469, and *Elliott* v. *Newby*, 9 N. C., 21, cited and approved.

Cause removed from the Court of Equity of Cumberland County, at the Fall Term 1850.

The cause was set for hearing on bill and answer, and transferred to this Court; and upon the pleadings the case is this. Neil McLeran, the elder, by his will gave his whole estate to his wife, Christian, during her life. He adds: "After her decease I wish the same disposed of as follows." Then, after several particular devises and bequests to some others of his children, comes this clause: "I give and bequeath to my sons, Nevin, John, Neil and David, and their heirs, 440 acres of land on Buck Creek, my stock of all kinds, except such as is herein otherwise disposed of, my plantation utensils and kitchen furniture, also my two negroes, Stephen and Jim, and my blacksmithing tools and wagon: all of which I wish sold and the proceeds to be equally divided amongst my said four sons, Nevin, John, Neil,
(71) and David, after my funeral expenses and debts are paid out of the same. And further I bequeath to my four sons, Nevin, John, Neil and David, $500 in money, which I now have at interest, if necessity do not compel me or my wife to dispose of said money or part thereof before our decease." The defendant is the executor, and, upon the death of the testator in 1842, he proved the will and assented to the legacies to the widow, who took the slaves and other chattels into her possession. The testator lived six years after the making of his will and called in and spent two hundred dol-

lars of the money he had at interest; and the widow, who died in 1847, called in the residue and used it in her necessary support. The plaintiff is the testator's son John, mentioned in the will, and resided out of this State; and, during the life of his mother, one of his creditors here sued out an original attachment against him and served it on his interest in the land and two negroes, and, after judgment, had the same sold under execution thereon. One Colvin purchased the land for $70, and afterwards sold it to the defendant and he took the sheriff's deed therefor. The negroes were purchased by the defendant, but they were not present at the sale, and were, at the time, in possession of Mrs. McLeran at her residence; and afterwards one of them died in her life time. In 1848 the defendant sold the surviving slave for $649, the other chattels, which the widow had not consumed, for $36, and the land on Buck Creek for $1,408, on a credit of six months. The bill is brought for the plaintiff's share of one fourth part of the proceeds of the land and other property, insisting that his interest therein was not subject to attachment and execution, and also for a share of the money at interest—submitting, however, to allow thereout the sum paid by the defendant on the executions against the plaintiff and interest thereon.

(72)

Banks, for the plaintiff.
Strange and *W. Winslow*, for the defendant.

Ruffin, C. J. There was an ademption of $200 of the money legacy by the collection and expenditure of that sum by the testator. There is an implied gift of the residue of the money to the testator's wife, if she should need it; and, as the cause is heard on the bill and answer, and the defendant states expressly that it was applied to her necessary support, the whole of that fund is exhausted, and the plaintiff can have no relief in respect thereof. But as to the residue of his demand, the Court holds, that he is entitled. Even if the negro had been liable to the execution, the sale of him was void,

as he was not present. Blanton v. Morson, Ante, 47. But in truth the plaintiff had in neither the negro nor the land such an estate, as could be taken on attachment or execution. For, although the language in the first part of the clause imports a gift of the land, negroes, and other property to the four sons in remainder, yet the latter part clearly shows that the things themselves are not given to them, but only the proceeds of them in money after a sale by the executor. For a sale of all is expressly directed, and, as no one else is appointed to make it, the duty devolves necessarily upon the executor the more especially as the funeral expenses and debts are charged upon the fund arising from the sale. The assent of the executor to the life estate can have no effect even upon the slave, since the executor had a trust to perform in respect of him after the death of the tenant for life, and therefore the property remained in the executor and was not subject to attachment against the cestui que trust. Dunwooddie v. Carrington, 4 N. C. 469. Elliott v. Newby, 9 N. C. 21. So, in respect of the land, if it be admitted that the legal estate descended, or passed to the four sons as devisees, yet it was vested in the heirs or the devisees, sub-
(73) ject to the power of the executor to sell, and it was divested by the exercise of the power of the executor in making the sale; which he was not only at liberty, but obliged, to do, in execution of the trust in favor of the testator's creditors and the other sons. It results that the right of the plaintiff to a share of the proceeds of the sale made by the executor continues unimpaired, and that the defendant is bound to account and pay him what may be found due, subject to the deduction the plaintiff submits to allow. There must be the usual enquiry, and the defendant must pay the costs up to the hearing.

PER CURIAM. Decree accordingly.

Approved Munds *v.* Cassidey, 98 N. C., 558; Perkins *v.* Presnell, 100 N. C., 220; Owender *v.* Call, 101 N. C., 399.

TIMOTHY W. WARD & AL. vs. HARDY W. B. TURNER & AL.

Where it is alleged that a note, belonging to an estate, has been fraudulently and in breach of trust, transferred by the executor, there must be an inquiry into the state of the assets; for if a balance was due to the executor to the amount of the note, it was not a fraud in him to appropriate it to the payment of his own debt.

Plaintiffs are not allowed to impeach a single item in the administration of assets. It can only be reached by a general account, which will be final, not only as to the item particularly complained of, but as a settlement of a whole subject.

The cases of *Hinson* v. *McKinzie*, 16 N. C., 468, and *Baird* v. *Baird*, 21 N. C., cited and approved.

Appeal from a decree of the Court of Equity of Martin County, at the Fall Term 1849, his Honor Judge Battle presiding.

(74)

Rodman, for the plaintiffs.
Heath, for the defendants.

PEARSON, J. Upon the pleadings and proof the following case appeared:

The defendant Hammond, as the executor of one Ward, sold the property, and, in payment, took the note, among others, of one Spruil for $276, six months after date payable to the said Hammond, "executor to the last will and testament of Will W. Ward."

Hammond became insolvent, and left the State, without settling the estate of the testator or in any way accounting for the assets. After his departure, his wife, in pursuance of directions from him, gave the note to the defendant Price, to be applied to the payment of a debt, for which he was bound as the surety of Hammond. The note was overdue at the time Price received it. He sold it to the defendant, Turner, who collected it from Spruil.

One of the plaintiffs is a creditor of the testator. He has obtained judgment at law against the executor, which has not been satisfied. The other plaintiffs are the children and legatees of Ward. The prayer is, to follow the note and to subject Price and Turner to the payment thereof, as a part of the estate of the testator.

The bill is taken pro confesso as to Hammond. The answers of Price and Turner do not vary the case as stated above, with the exception of an allegation, that Hammond, before he went away, had a settlement with the guardian of the children, who are the plaintiffs, and was allowed to retain the note in discharge of a balance found to be due him. There is no proof of this allegation.

In the Court below, the plaintiffs had a decree, and his Honor declared his opinion to be, that Price is primarily liable. Price appealed.

(75) We assume, that Hammond was put out of the question, being admittedly insolvent and having removed to parts unknown, and the question as to primary liability was between Price and Turner.

Price took the note after it was dishonored. It appeared on its face to be the property of the estate of Ward. He received it to relieve himself, as the surety of Hammond, and sold it to Turner. It is too plain for argument, not only that Price is bound to account for the value of the note, but that he is primarily liable, and must satisfy the decree, if he is able, before recourse is had to his vendee.

We should, therefore, have no difficulty in affirming the decree, but for the fact, that a preliminary question, necessary to the equity set up in the bill, has not been disposed of.

The equity rests upon the allegation, that the note in question was fraudulently and in breach of trust transferred by the executor. This involves an inquiry as to the state of the assets; for, until an account is taken, it cannot be known how the balance stands; whether for or against the executor. If the balance be in his favor to the amount of the note, it was not a fraud in him to appropriate it to the payment of his own debt. There is no admission, which relieves the plaintiff from the necessity of having a general account of the estate, so as to show a balance against the executor, and thereby fix him with the fraud.

Plaintiffs are not allowed to impeach a single item in the administration of assets. This might lead to endless

litigation and multiplicity of suits. One item cannot be singled out as the foundation of a suit. It can only be reached by a general account, which will be final, not only as to the item particularly complained of, but as a settlement of the whole subject. Hinson v. McKinzie, 16 N. C. 468.

So, in the case of partners, a bill will not lie for
(76) a misapplication of one note or one sum of money, belonging to the firm, because the alleged misapplication cannot be established without a general account, and because such account will settle the whole and prevent multiplicity of suits. Baird v. Baird, 21 N. C. 524.

A final decree is entered without taking notice of this point. It may be, the parties waived it, being satisfied how the account would result, but there is no entry to that effect on the transcript. The decree, therefore, must be reversed; and this opinion certified, to the end that an account may be taken of the estate which came into the hands of the executor; unless the defendants waive it, and admit that there is a balance against the executor, equal to the amount of the note of Spruil, or unless the parties agree on some other amount. We allow no costs.

PER CURIAM. Ordered to be certified accordingly.

Approved. *Post*, 211.

(77)

BENJAMIN F. KNIGHT vs. REDMUN BUNN & AL.

A deed in trust to secure creditors, thus described one of the notes intended to be secured: "A note to John Ricks for about twenty-three hundred and fifty dollars, now in possession of D. A. T. Ricks, given several years since, to which Bennett Bunn, B. D. Battle and Robert Ricks are sureties." *Held*, that parol evidence could not be received to show that this description was given by mistake, and that the note intended was as follows: "$2412.26 cents. With interest from the 10th of January we or either of us promise to pay D. A. T. Ricks, guardian, two thousand four hundred and twelve dollars twenty-six cents, for val. rec'd. Witness our hands and seals 18th February, 1849. Redmun Bunn, Bennett Bunn, B. D. Battle."

Equity never interfers to aid one creditor against another, on the ground of mistake.

The cases of *Simpson* v. *King*, 36 N. C., 11, and *Barnes* v. *Sims*, 40 N. C., 292, cited and approved.

Cause transmitted to the Supreme Court from the Court of Equity of Nash County, at the Fall Term 1850.

No counsel for the plaintiff.
B. F. Moore, for the defendants.

PEARSON, J. This is a bill by a trustee under a deed of trust for the security of creditors, asking the advice of the Court as to the proper construction of the deed and directions to the trustee.

The difficulty presented by the trustee arises upon the following facts:

(78) In September 1849, the defendant, Bunn, executed a deed of trust to the plaintiff, by which he conveyed a large amount of property in trust to sell, and pay certain debts.

Among the debts named in the first class, one is described in the following terms: "A note to John Ricks for about twenty three hundred and fifty dollars, now in possession of D. A. T. Ricks, given several years since, to which Bennett Bunn, B. D. Battle, and Robert Ricks are sureties." The defendant, Bunn, at the time he executed the deed, did not owe any note to John Ricks, and in fact John Ricks was then dead. But he owed a note to D. A. T. Ricks, which was executed on

the 13th of February 1849, in renewal of a note given to John Ricks, in his life time, for $2,354.40 cents, to which Bennett Bunn, B. D. Battle and Robert Ricks were sureties, the said D. A. T. Ricks having taken it as guardian of the children of said John after his death, which latter note is as follows: "$2,412.26 cents. With interest from the 10th of January, we or either of us promise to pay D. A. T. Ricks, guardian, two thousand four hundred and twelve dollars twenty-six cents, for val. rec'd, witness our hands and seals 13th of February 1849," and executed by Redmun Bunn, Bennett Bunn, and B. D. Battle. The plaintiff, therefore, charges, that a question is made, whether he has a right to pay this latter note as being the debt set out in the deed of trust, under the description above recited, and he prays that the parties interested may interplead and settle the question, for his protection in the administration of the trust fund.

Redmun Bunn says in his answer, that in the haste of making the deed of trust, and owing to his embarrassed feelings, he had forgotten the circumstance, that the note had been renewed, and had he called to his recollection the names of the sureties on the last note, he would have put the debt in the second class, and his purpose in putting the note in the first class, was
(79) to secure Robert Ricks the only solvent surety; he admits that he meant to describe the debt, which he had owed to John Ricks, and which was delivered to the guardian of said Ricks' two children in the distribution of his estate. The children of John Ricks insist, that the note, given to their guardian in renewal of the note held by their father, answers the description set out in the deed, and that, at all events, it was a clear mistake, by which they ought not to be prejudiced. The other creditors of Bunn allege that their debts are honestly due and insist upon their rights.

Without explanation, it would not occur to any one, that the note payable to D. A. T. Ricks, as guardian, answered the description of the note, set out in the deed; there is not a correspondence in a single particular. One is to John Ricks, the other to D. A. T. Ricks, guardian;

one was executed several years before the deed, the other but a few months before; one has three sureties, the other but two. The difference in the amounts would not be material, provided there was any other sufficient correspondence; and the question is, can this discrepancy be explained by parol proof? Every written instrument must speak for itself, and cannot be added to, varied, or explained by parol evidence. This is a well settled rule, both in regard to wills and other instruments, and cannot be departed from, without opening wide the door to perjury; and making all rights uncertain. We are constrained to adhere to the rule and put out of view, as inadmissible, the explanation which is offered. *Simpson* v. *King*, 36 N. C., 11; *Barnes* v. *Sims*, 40 N. C., 292.

This may be a hard case, but it has been well said, "hard cases are the quicksands of the law," and we must take care not to fall into them. It is better to submit to a particular hardship, than to create a general inconvenience. No relief can be given on the ground of mistake, because the defendants, who are creditors, are equally meritorious and may stand on their rights.

(80) Equity never interferes to aid one creditor against another on the ground of mistake. It must be declared, that the note to D. A. T. Ricks is not secured by the deed of trust, and the plaintiff must pay his costs out of the fund. The defendants must pay their own costs.

PER CURIAM. Declared accordingly.

Approved. Smith *v.* Turrentine, 55 N. C., 253; Miller *v.* Cherry, 56 N. C., 24.

DAVID B. MELVIN, EX'R. &c. vs. HARDY ROBINSON & AL.

The plaintiff in Equity must, to entitle himself to a decree, sustain his own allegations. It will not be sufficient for him to rely upon any equity, disclosed in the answer, other than that alleged in his bill.

The case of *Crawley* v. *Timberlake*, 36 N. C., 346, cited and approved.

Cause removed from the Court of Equity of Sampson County at the Fall Term 1850.

Strange and *W. Winslow*, for the plaintiff.
D. Reid, for the defendants.

NASH, J. The bill was filed originally to enjoin a judgment at law upon a bond, executed by the complainant to the defendant, Robinson, and by him assigned to the defendant, Mathis. The answers came in at Fall Term 1845, of the Court of Equity for Sampson County: and upon motion by the counsel of the defendants, the injunction previously granted was dissolved. From this interlocutory decree no appeal was taken, but at the Spring Term following, the bill was con-
(81) tinued over as an original bill, and the plaintiff replied to it. At Spring Term 1849, the cause was set for hearing, and at Spring Term 1850 transferred to this Court. The cause is now to be heard, precisely as if it had originally been filed to procure a decree for the recovery of the money paid under the judgment obtained. The plaintiff alleges, that an apprentice of his, a slave named Dorsey, was arrested under a charge made by the defendant, Robinson, that he, through the instrumentality of the plaintiff, had enticed from his possession a negro named Riley; and that Mathis, the other defendant, represented to him, that the charge was a serious one, and, if proved, would take Dorsey's life; and that Robinson was willing to compromise the matter and have the boy discharged, if the plaintiff would execute his bond for $400, which he did. After this Dorsey was committed to jail, whereupon the

bond to Mathis was given up. Subsequently, and while Dorsey was in jail under the charge, another contract was made between the plaintiff and the defendant Robinson, that the former should pay the latter $25 in cash, and give his bond for $375, and the latter was to "discharge Dorsey entirely from the charge and set him at liberty." The answers of the defendants positively deny, that either the bond for $400 or that for $375 was given for the purpose alleged in the bill, but simply to indemnify the defendant, Robinson, for the loss of his slave, Riley, and the expenses to which he might be put in recovering him. And Robinson, in his answer, states, that there was a controversy subsisting between him and one Sutton, concerning the title to Riley; and that a suit had been brought against him by Sutton for the recovery of the slave and was then pending; and that, by the inducement of Dorsey, Riley was put into the possession of Sutton. The sole ground, upon which the plaintiff places his right to the relief he seeks, is, that the bond was given to suppress a State prosecution.

(82) No doubt, if the facts were so, the bond is void both in law and in equity. But the defendants deny, that such was the consideration, upon which it was given, and the plaintiff produces no evidence whatever to prove it. When the defendant, in his answer, admits the plaintiff's equity on the facts, on which it is founded, but sets up an equity in himself of a distinct nature, he must sustain his answer by proofs. Lyerly v. Wheeler, 25 N. C., 599; but where he denies the plaintiff's equity, the plaintiff must sustain his allegations by proper proofs. It will not be sufficient for him to rely upon an equity disclosed in the answer, other than that alleged in his bill—the *probata* and the *allegata* must agree. Crawley v. Timberlake, 36 N. C. 346. The answers further allege, that the defendant Robinson surrendered Dorsey to the Superior Court, to which he was bound over; and that the prosecuting officer, on behalf of the State, caused him to be discharged—not for want of the testimony of Robinson or any other witness, but because, according to the facts stated to him, no offense against the law had been perpetrated by him; and, in

fact, the statements of the bill, so far as Dorsey is concerned, show neither a felony nor misdemeanor, punishable by indictment, perpetrated by him.

The plaintiff, not having produced any evidence to sustain his allegations, and they being denied by the defendants, the bill must be dismissed with costs.

PER CURIAM. Bill dismissed with costs.

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(83)

JOHN J. HOOKS & AL. vs. BLACKMAN LEE.

Where in an agreement in contemplation of marriage between A. and B. the intended wife, (no trustee being interposed) it was stipulated that B. shall "have and hold (her property) the land, negroes, &c., to the only use and benefit of the said B., her executors and assigns forever." *Held*, that these words cannot be considered as amounting to a gift to her next of kin.

"Executors and administrators," taken as words of purchase, cannot mean "next of kin."

If there were nothing more in the deed, it would be held clearly, that B., taking an absolute estate and dying without making disposition thereof, the personal estate would pass, according to law, to her husband as her administrator, or to such person as might administer for the husband.

But where, in the same deed or agreement, it was further stipulated, "That I, the said A., do hereby assign, sell, deliver, alien and confirm, and have by these presents sold, aliened, assigned, delivered and confirmed to the said B. all the right, title, estate, interest and benefit, which I may by law acquire, derive or receive, either in law or equity, in and to the (said) real and personal estate, belonging to the said B. by reason of the said intermarriage;" it was held that A. had thereby renounced and given up all right, which he would otherwise have been entitled to, either in law or equity, after the death of his wife, as her husband, and of course could claim none of the property, so secured in that capacity.

It was held further, that this construction was not varied by the insertion in the clause covenanting for further assurance, of the words "entirely to divest himself of right, title and estate in and to the land and negroes, &c., so that he nor his creditors shall have any right to sell or contract the same."

Appeal from an order overruling a demurrer, made at the Spring Term 1850, of Wayne Court of Equity, his Honor Judge Bailey presiding.

The bill in this case was filed by John J. Hooks, Wil-

liam R. Hooks, and Franklin H. Hooks, and set
(84) forth in substance: That on the — day of March
1837, Mary Hooks, of the County of Wayne, being a widow and the mother of the plaintiffs, was addressed by the defendant, and proposals of marriage were made and accepted; that the said Mary was seized and possessed of a valuable real and personal estate, consisting of lands, slaves and other personal property, and it was, among other things, agreed, upon the treaty of marriage between the said Mary and Blackman, that all the estate of the said Mary, real and personal of the said Mary, should be so secured to the said Mary, by deed of marriage settlement, that, notwithstanding the said marriage, she should not be deprived of her right, title and property in and to the said estate, real and personal, but that she should have, hold and enjoy the same, free and exempt from any claim, right or interest, either in law or equity, which, by operation of law, the said Blackman might acquire or derive by reason of the said intended marriage, and neither the said Blackman nor his creditors should acquire by said marriage any right, title or estate in said property, except that the said property might remain during the marriage, in the occupancy and use of said Blackman, he paying therefor an annual rent of one dollar, if demanded.

The bill further sets forth, that, before the solemnization of the said marriage, an instrument or deed of settlement, bearing date the 14th of March 1837, was made and executed by the said Mary and Blackman, which was duly proved and registered, a copy of which hereunto annexed, marked, A., was made a part of the bill. And the bill further sets forth, that the female slaves, named in the said deed, have had several children, since the execution of the said deed, which are now in the possession of the said defendant, and whose names, as far as known, are Phereby, &c.

And the bill further sets forth, that the said marriage was solemnized immediately after the execution
(85) of the said indenture; and that the said Blackman, for many years thereafter, always admitted the separate estate and property of the said Mary in the

said lands and slaves, and, in particular charges, as a clear indication of the view, which the defendant had of the operation and effect of the said settlement, that, in February 1841, the negro Pompey was sold by the said Mary, and she permitted the said defendant to receive and use the money, but the said defendant made and delivered his note to the said Mary, payable to her, for three hundred and forty dollars, the price of the said negro, and the said note was in possession of the said Mary in the Fall of the last year, since which time it is supposed it has come to the hands of the said defendant; and, also, that, on the 8th day of February 1848, and on the 21st day of March 1848, the said Blackman distinctly recognized the right of the said Mary to sell and dispose of the said settled property, he being a party to certain deeds to the plaintiffs, John and Franklin, whereby the said Mary conveyed to them certain lands, being a part of the said real estate contained in the said settlement, which deed the said plaintiffs have ready to produce, &c.

And the bill further sets forth, that the said Mary departed this life on the —— day of June 1849, leaving the plaintiffs and the defendant her surviving, and that the defendant hath, as the plaintiffs are informed, taken out letters of administration upon the estate of the said Mary, at August Term 1849, of the County Court of Johnston, and claims to hold, for his own use and benefit, all the personal estate of the said Mary, although the same is included in the said deed of settlement, and denies that he is accountable for the same or any portion thereof to the plaintiffs, who are the children and next of kin of the said Mary, as aforesaid.

And the plaintiffs in their said bill say, that they are advised, that the said deed is informal and defec-
(86) tive, as a marriage settlement, because the said property was not conveyed to a trustee for the uses and purposes therein expressed; yet the said agreement, being made between the parties for a valuable consideration, and the intent and meaning thereof being apparent, this Court will not suffer the same to fail and become nugatory, for want of a trustee, and that,

although the covenants and agreements in the said deed may be extinguished at law, by the marriage of the parties thereto, yet the said defendant will be decreed and held a trustee for the uses and purposes, declared in the said deed, according to the just construction of the same and the rules and principles of this Court; and that the plaintiffs are further advised, that, by the true construction of the said deed, the said Mary was entitled to her estate in the said real and personal property, unaffected and unimpaired by the said marriage, and that, upon the death of the said Mary, the same, with the increase of the said negroes, devolved upon the plaintiffs, as the next of kin of the said Mary, and that they are entitled to call upon the said defendant to surrender the said negroes and their increase, and the proceeds of any that may have been sold, and also to such account of the rents, profits and hires of the said property, as the Court may deem just and proper.

The plaintiffs then, in the said bill, pray that the defendant may answer the interrogatories therein propounded touching the premises, and that he may be decreed to surrender the said negroes and their increase, and the produce of the sales and hires, if any, and pay to the plaintiffs what may be due and owing on the said account and settlement, and may have such other and further relief as the nature of the case may require, and pray process, &c.

Upon the return of the process, the defendant appeared and filed a general demurrer to the plaintiffs' bill. On argument it was ordered by the Court that the demurrer be overruled and that the defendant an-
(87) swer, &c. From this order the defendant, by leave of the Court, appealed.

STATE OF NORTH CAROLINA—Johnston County.

This Indenture, made and entered into this 14th day of March 1837, between Blackman W. Lee, of the County of Sampson and State aforesaid, of the first part, and Mary Hooks, of the first named State and County, of the second part, witnesseth: That whereas the said Blackman W. Lee and Mary Hooks, having en-

tered into an agreement of marriage, which marriage is soon to be legally solemnized, and the said Mary Hooks, being of her own right seized and possessed of a large real and personal estate, is willing and anxious so to execute, that the said Mary Hooks shall not be deprived of the use, benefit, and profit of the said estate, real and personal, by reason of their intended marriage, and the said Mary Hooks being of lawful age to be her own agent; now, therefore, be it known, that for and in consideration of the premises, and for and in consideration of the sum of one dollar to me the said Blackman W. Lee by the aforesaid Mary Hooks, before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, I, the said Blackman W. Lee, do hereby sell, assign and deliver, alien and confirm, and have by these presents sold, assigned, aliened, delivered, and confirmed unto Mary Hooks aforesaid, all the right, title, estate, interest, and benefit, which I may by operation of law acquire, derive or receive at law or equity in and to the following real and personal estate, now belonging to the said Mary Hooks, by reason of the said intermarriage between the said Blackman W. Lee and Mary Hooks, viz: Twenty slaves; named, Owen, about 26 years; Pompey, 50 years; Charles, 30; Elijah, 26; Harry, 26; Baltimore, 14; Cader, 10; Henderson, 7; Isaac, 5; Simon, 5; Alvin, 2; Sawney, about one month; Patience, (88) 40; Amoritt, 25; Rane, 24; Teney, 19; Ginny, 10; Margaret, 8; Munny, 3; Martha, 2; also one tract of land in Sampson County containing 830 acres, lying in the fork of Big Cohara and Ward's Swamp, adjoining A. Fleming and Joshua Craddoe; also, two tracts of land in the County of Johnston, being the place where the said Mary now lives, containing eight hundred and seven acres, bounded as per deed from Susannah Blackman to said Mary, dated the 21st day of February 1829; also one other tract of land, joining the above, containing thirty acres as per deed from John Eason to said Mary Hooks, bearing date the 10th day of December 1832; also one close carriage and two horses —to have and to hold all and singular the aforesaid lands, negroes, carriage, and horses to the only use and

benefit of the said Mary Hooks, her executors and assigns forever; and the said Blackman W. Lee doth solemnly covenant, promise, and agree to and with the said Mary Hooks, that he will, upon the solemnization of the said marriage, or at any time thereafter, when requested by the said Mary, make, execute and deliver all and every necessary title, deed, or conveyance, advised and directed by counsel learned in law, more completely and effectually to secure the intention of this indenture, which is entirely to divest himself of right, title, and estate in and to the above mentioned lands, negroes, carriage and horses; so that he nor his creditors shall have any right to sell or contract the same or any part of said lands, negroes, or their increase, carriage and horses. It is further agreed and understood by and between the contracting parties aforesaid, that the lands, negroes and chattels may remain in the use and occupancy of the said Blackman W. Lee, he paying therefor by way of hire or rent the sum of one dollar on the first day of January in each and every year, if demanded. It is further agreed by and between the parties to this indenture, that, if it shall be desirable to sell or exchange the whole or any part of the above
(89) mentioned real or personal property, the said Mary may transfer and lawfully convey the whole or any part of said real or personal property to any person whatsoever, receiving a fair and full consideration for the same; which consideration, whether it be money or property, she shall hold, possess, and keep in the same manner as the property hereby conveyed is to be held and kept; and this indenture to be as binding and legal as if a third person had been appointed as agent or trustee, the said Mary acting as her own agent and trustee.

In witness whereof the parties have hereunto set their hands and seals, the day and year first above written.

BLACKMAN W. LEE, [Seal.]
MARY HOOKS. [Seal.]

Signed and sealed in presence of
JOHN EASON,
YOUNG ELDRIDGE.

J. H. Bryan, with whom were *Husted* and *Washington*, for the plaintiffs, submitted the following argument:

The demurrer admits the case as stated by the bill, which is, that Mrs. Hooks was a widow, with three children, that the property settled was entirely her own, that the object of the settlement was not only to preserve her rights to the property unimpaired, but that the property itself should not be affected by the marriage, nor rendered liable either to the contracts of the husband or to the rights of his creditors.

The property settled consists of lands and negroes—personal chattels in possession.

It is declared that the husband shall not acquire any interest whatever by the marriage, and he sells, assigns and confirms unto Mary Hooks all right, title, estate, interest and benefit which he may, by operation (90) of law, acquire, derive or receive, either in law or equity, to the property, &c.

Upon the construction of this settlement, the question is emphatically, as was said by Lord Thurlow, in Woodcock v. Duke of Dorset, 3 Bro. C. C. 569, "what is the truth and honor of the case?" and that is to be answered by ascertaining by a liberal construction what is the true intention of the settlement.

The defendant, if he have any claim, has it as husband; it is the *jus mariti*—the settlement is not to be construed by what was subsequently happened; but its meaning now is what it was on the day of its execution; it cannot be affected by the fact of the wife pre-deceasing the husband.

Upon the marriage, there being no trustee, the husband became possessed of the slaves absolutely as the legal owner—and upon his death, they would have devolved upon his executor or administrator—they were personal chattels in possession; they were not choses in action, which could only be reached by administering upon his wife's estate—his claim upon the death of the wife was still *jure mariti* and not as administrator.

The husband is not next of kin and cannot claim as

such. Bailey v. Wright, 18 Ves., 49; Tyson v. Sugg, 9 N. C., 472; Oliver and Jones, 38 N. C., 369.

The defendant, therefore, if he claim here, must be allowed by this Court to claim against his express conveyance, renunciation and release.

The intention of the settlement is rendered more apparent from the fact, that not only the defendant, but his creditors, are excluded from deriving any benefit from the settlement, and this is an argument against his holding the property for his own use in any capacity: for if he holds it for his own use, his creditors must necessarily be entitled to subject it.

But the words, "to have and to hold all and
(91) singular the property, &c., to the only use and benefit of the said Mary, her executors and assigns," do not contemplate or allow the claim of the defendant, as her administrator. It is impossible that the words, "her executors and assigns," can here be regarded as words of limitation, for they embrace valuable real estate as well as personal—they embrace the whole property as one corpus—the Court must hold them to be words of purchase; and then their true meaning is to be ascertained, which, especially in marriage articles, depends upon the intention, and, to ascertain that, a liberal interpretation (as is said by Judge Gaston in Gause v. Hale, 36 N.C. 241,) is to be given.

"Taking the whole instrument together what is the intention of the parties," as is said in Smith v. Dudley, 16 E. C. R. 132

That the Court will make technical words yield to what they believe the intent of the agreement, is shown by the cases of Bulmer v. Joly, 5 Sim., 54; 8 E. Cond. Ch. Rep., 345; 3 M. & K., 197; Palin v. Hills, 1 M. & K., 470; Hames v. Hames, 2 Keen, 646.

In this Court, the wife may have a separate property with all its incidents, and this settlement will receive the same construction, as if there had been a conveyance to a trustee. In that case, upon the death of the wife, it is submitted that the husband could not have claimed against his covenants, but the trustee would have held for the heirs and next of kin of the wife.

There is a special provision made here for the husband by the settlement—he is to have the use and enjoyment of the property, paying a nominal rent, if demanded. This is entirely inconsistent with his taking the entire interest and estate—this would be taking "part and the whole." And where would be the estate of the wife? The whole object of this anxiously executed settlement would be to secure her one dollar per year of her
(92) property, during the coverture, and upon its dissolution by her death the whole would go absolutely to the husband.

W. *H. Haywood* and *Miller*, for the defendant.

PEARSON, J. The case turns entirely upon the construction of the deed of settlement, as it is called.

We concur with the defendant's counsel in the position, which was mainly debated upon the argument of the cause, that the words, "To have and to hold all and singular the land, negroes, &c., to the only use and benefit of the said Mary Hooks, her executors and assigns forever," cannot be considered as amounting to a gift to her next of kin. For, "executors and assigns," taken as words of purchase, cannot mean "next of kin." No case has ever gone so far, and the authorities cited for the defendant fully prove that these words, taken as words of purchase, designate the personal representatives. Executors and administrators, 1 Phillips 1. But, in truth, the words, as used in this clause, are only intended to limit to Mary Hooks an absolute estate, and they are used in reference to her in the same sense that they would have been used in reference to a trustee, had there been one—that is, to convey the idea, that the estate was to be absolute. If there was nothing more in the deed, we should hold clearly, that Mrs. Hooks taking an absolute estate, and dying without making a disposition thereof, the personal estate would pass according to law to her husband as administrator, or to such person as might administer for the use of the husband.

But from the whole instrument the intention is clear,

that the defendant had agreed to accept the use and profits of the land, negroes, &c., during the coverture at a nominal rent of one dollar, if demanded, and to divest himself, to renounce, and give up all further right, which he would otherwise have been entitled to, either in law or equity as husband. The language used
(93) to express this intention is as definite and explicit as language can be, and the only want of perspicuity is occasioned by using too many words, in the earnest desire, that the intention should not be misunderstood.

"I, the said Lee, do hereby sell, assign, deliver, alien, and confirm, and have by these presents sold, assigned, aliened, delivered and confirmed to the said Mary Hooks all the right, title, estate, interest and benefit, which I may by operation of law acquire, derive, or receive, either in law or equity in and to the following real and personal estate, belonging to the said Mary Hooks, by reason of said intermarriage."

Our attention was called to the fact, that in the clause covenanting for further assurance, the intention is not expressed quite so forcibly. The intention is, "entirely to divest himself of right, title, and estate in and to the land and negroes, &c.; so that, he nor his creditors shall have any right to sell or contract the same."

If these words were inconsistent with the intention previously expressed, in what may be called the "enacting clause," it would be difficult to hold, that, by any sound rule of construction, they could have the effect of qualifying or varying the stipulations of the parties; for, the object of the covenant is not to vary the stipulations, but to provide that they should be carried fully into effect. The two clauses, however, are not inconsistent, and may well be read together. The intention is, "entirely to divest himself of all right or title; so that he shall have no right to sell;" and so that he shall have no interest, estate or benefit, either in law or equity, by reason of the intermarriage, as is hereinbefore provided and agreed on, except that he is to have the use and profits of the property during coverture at a nominal

rent. The demurrer was properly overruled; and the defendant must pay the costs. This opinion will be certified.

PER CURIAM. Ordered to be certified accordingly.

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(94)

JAMES M. DONNELL & AL. vs. JOHN MATEER & AL.

The right of a tenant in common to partition of a legal estate is as absolute in a Court of Equity as in a Court of Law. The courts have concurrent jurisdiction, as to an actual partition, must adjudicate on the same principles.

In the case of a petition at law for an actual partition, if the defendant wishes to avail himself of an equitable defence, as, for instance, a claim under a contract for purchase, he must obtain an injunction to stay proceedings at law, until the cause can be heard in equity.

If the application for petition be to a Court of Equity, it is not sufficient for the defendant to rely upon his equitable grounds of defence in his answer. He ought, to entitle himself to his equity, to file a cross bill, for which the Court would allow him a reasonable time; but his failure to do so will not prevent him from filing a separate bill for relief, as the partition affects the legal title only, and the share, assigned in severalty, could still be reached.

Cause transmitted from the Court of Equity of Rockingham County, at the Fall Term 1850.

This was a bill for the sale, for partition, of a tract of land, alleged by the plaintiffs to belong to them and the defendants, as tenants in common. The case appeared from the pleadings to be this:

William Mateer died intestate in 1835, seized in fee of a tract of land containing 100 acres, and described in the bill. He left no issue; but his heirs at law were two brothers, the defendants, Andrew and John, and two sisters Polly and Margaret, who held the premises as tenants in common. Polly intermarried with
(95) Joseph Donnell, and they had issue one child, James M. Donnell, who is one of the plaintiffs, and then died; and Margaret intermarried with Joseph D. Watson and had one child, John H. C. Watson, who is one of the plaintiffs, and then she died. The bill was

filed in March 1849 and prays for partition of the premises, and, to that end, for a sale thereof, and that one fourth part be set out to the plaintiffs respectively. The answer admits that the seisin of William and the descent from him to his brothers and sisters, as stated in the bill. It further states, that shortly after the death of William, their father, James Mateer, made a contract with his children John, Polly, and Margaret, for the purchase of their shares of the premises at the price of $375, which he discharged by paying to each of them $125; but that, the transaction being in the family, he took no receipts therefor, nor conveyance, nor any written memorandum of the contract of the land; that he also agreed, at the same time, with the defendant, Andrew, to give him the same price for his share, or to leave the whole tract to him by will; and that he afterwards devised the land to Andrew in fee and died in 1845. The answer states, that the plaintiff, Donnell, had recently acknowledged, that his father and mother made the contract of sale and received their share of the purchase money, and for that reason he professed himself willing to convey to the defendant, Andrew, his one fourth part of the land. And the answer insists, that the contract of sale is good and valid, and ought to be specifically decreed in this Court; and that, therefore, the defendant, Andrew, is the equitable owner of the whole tract, and that the plaintiffs are trustees for him, and ought not to have the partition prayed for.

Miller, for the plaintiffs.
Morehead, for the defendants.

(96) RUFFIN, C. J. The proofs of the alleged contract between the father and his daughters are in some respects very unsatisfactory. But the Court does not go into them, because, if they fully sustained the answer, no case would be made out, on which the prayer of the bill could be denied. The parties to this suit are tenants in common, and either one of them has an absolute right to partition, either specifically, or by a sale and a division of the price. The plaintiffs might

have proceeded at law and obtained a partition of the land, and no resistance could be made against it at law. It is true, the defendant Andrew, as the devisee of his father, might have filed his bill for the specific performance of the contract of sale, and, by showing a prima facie case for a decree for a conveyance, he would have entitled himself to an injunction against proceeding at law, until the cause could be heard in equity. But very clearly he could not have an injunction upon a bill framed upon the matter contained in this answer, since the contracts set out are absolutely void and could not entitle the party to a decree for specific performance on the hearing. They are void, by the statute of frauds, because they were not in writing, and that of Mrs. Donnell, because she was married at the time. The right of a tenant in common to partition of a legal estate is as absolute in this Court as it is at law; for the jurisdiction as to the actual partition is concurrent in the Courts of law and equity, and therefore both Courts must adjudicate on the same principle. The only necessity a tenant in common is under, for coming into the Court of Equity, is that, which arises from the inconvenience of an actual partition, and induces him to apply for a sale. But that does not change the principle applicable to this case, and the plaintiffs are strictly entitled to partition in the one form or the other, when the legal tenancy in common is admitted, unless the other party, upon a proper bill, get a decree declaring them trustees
(97) for him and ordering a conveyance. It does not suffice to state in the answer, as an obstacle to the partition, equitable grounds for such a decree; for, peradventure, the party might never institute a suit, putting the matter directly in issue and entitling him to the decree for specific performance. Therefore the defendant, Andrew, in order to get the benefit of the case he alleges, should have filed his cross bill and obtained an order to bring both causes on to be heard together. Without that, the legal rights of the plaintiffs must prevail, so far as to require the decree for partition. The partition will not, indeed, deprive the defendant of the right to specific performance, as the partition affects the

legal title only, and the share assigned in severalty to the defendant's vendors could still be reached by him. It is admitted, however, that it is more convenient and less expensive to all parties, that partition should not be made before the equitable rights are settled: and, if the defendant had a case with any color for a decree, the Court would await his filing a cross bill for a reasonable time. But, as has just been said, the defendant's case, as stated by himself, is radically defective: since, as to one of the vendors, there was coverture at the time of the alleged contract, and, as to both, the contract was oral and the plaintiffs have taken advantage of that defect by bringing their present bill. The plaintiffs must, therefore, be declared to be entitled to partition, and, if the parties do not agree on the point, it must be referred to the Master to enquire, whether actual partition can or cannot be made without injury to the parties, or some of them, and, if it be found that it cannot, then to state to which of them and to what amount. The defendant, Andrew, must pay the costs up to the hearing.

PER CURIAM. Decree accordingly.

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(98)

HENRY P. EASTON vs. JULIA J. EASTON & AL.

A testator devised to his son H. several tracts of land, and to his son John several tracts of land, including the home place after the death of his wife. He gave to each of his daughters, E. and M., a negro woman and four children. He gave to his wife absolutely six negroes, and lent to her during her widowhood four other negroes, and gave her plows, horses, cattle, &c., and lent her the home plantation, with the privilege of fire wood and rail timber on any of his lands for the use of the plantation. He then directed as follows: "I will that my negroes all to be hired out in common, except those given to my wife and also loaned to her, and the hire, and interest of my notes, to go for clothing and educating of my children, and the rest of my lands also." At the time of the testator's death, his son H. had just arrived at age. E. was 14, J. 10, and M. 8 years of age.

Held, 1st. That the widow was entitled to the immediate possession of the negroes, and the stock, farming utensils, &c., which were bequeathed to her; and also to the immediate possession and use of the home plantation; 2ndly. That H., having arrived at age, was entitled to the immediate possession of all the land devised to him, and the one-fifth part of the undisposed property, leaving the balance as a common fund for the support and education of the three other children, to be applied to that purpose at the discretion of the executor; 3rdly. That when M. arives at age or marries, she will be entitled to draw, out of the common fund, the negroes given to her and one-fifth of the property undisposed of; so, also, J., when he arrives at age, will be entitled to the land devised to him, subject to the life estate of his mother in the home place, and to one fifth of the undisposed of property; and 4thly, that when M. arrives at age or marries, she will be entitled to the negroes given to her and one-fifth of the property undisposed of; and the widow will then take the remaining fifth of the property undisposed of.

Cause removed from the Court of Equity of Pitt County, at the Fall Term 1850.

(99)

No counsel for the plaintiff.

Biggs, for the defendants.

PEARSON, J. This was a bill filed by an executor, to obtain from the Court advice in the construction of the will of his testator, upon the following state of facts:

In January 1843, John S. Easton executed his will, by which he devised to his son, Henry, several tracts of land, and to his son, John, several tracts of land, including the home place after the death of his wife. He bequeaths to his daughter, Eliza, a negro woman, Judah, and her four children: and to his daughter, Martha, a negro woman, Maria, and her four children. And he gives to his wife absolutely six negroes; and he lends to her, during her widowhood, four other negroes, and gives her two horses, a mule, barouche, and harness, cattle, ploughs, household furniture, &c.; and he lends to her the plantation, on which he then lived, with the privilege of fire wood and rail timber on any of his lands for the use of the plantation.

He then adds, "I will, that my negroes all to be hired out in common, except those given to my wife and also loaned to her, and the hire, and interest of my notes, to

go for clothing and educating of my children, and the rest of my lands also."

The testator died in 1846, leaving his wife and four children, Henry, who had just arrived at the age of twenty-one; Eliza, fourteen years of age; John, ten; and Martha, eight years. Besides the negroes named in the will, the testator owned five valuable negro men, one boy fifteen years old, and two young women; and he owned notes, bearing interest, amounting to about $1000, after paying debts, &c.

The bill seeks to have a construction of the will. We think the widow is entitled to the immediate possession of the negroes, and the stock, farming utensils, (100) &c., which are bequeathed to her; and also to the immediate possession and use of the home plantation. For, although the exception of the negroes in the above recited clause furnishes an inference, that no exception was intended to be made out of the general expressions, "and also the rest of the land," if it stood by itself, yet taking the will as a whole, we are satisfied, that it was intended to give the wife the immediate use of the home place, and to except it out of the "common" fund. Possibly he made the express exception of the negroes, because, in reference to them, he had used the word, "all;" which is not used in reference to his lands. But, however this may be, we infer he intended her to have the use of the home place; because she is not to draw any part of the common fund for her support; and, it is clear from the gift of the negroes, stock, farming utensils, furniture, &c., that he expected her to use the plantation and make her support in that way.

As Henry, although under age at the date of the will, had arrived at age when his father died, it was no longer necessary for him to draw on the "common fund." We think he is entitled to the immediate possession of all the land devised to him, and the one fifth part of the undisposed of property. This will leave the balance as a "common fund" for the support and education of the three other children, to be applied for that purpose at

the discretion of the executor. He will, of course, be influenced in a great degree by the annual income.

When Eliza arrives at age or marries, she will be entitled to draw, out of the common fund, the negroes, given to her, and one fifth of the property undisposed of. So, John, when he arrives at age, will be entitled to the land devised to him, subject to the life estate of his mother in the home place, and to one fifth of the property undisposed of. This will reduce the fund to two fifths; and when Martha arrives at age or
(101) marries, she will be entitled to the negroes, given to her, and one fifth of the property undisposed of; and the widow will then, under the provisions of the act of 1835, take the remaining fifth, the purpose of making the common fund and creating this charge upon the property undisposed of having been fully accomplished.

If it be asked, why the widow is not allowed to take her fifth part, until the youngest child arrives at age or marries, it is answered, because the property, although not finally disposed of, is charged for a certain purpose, and she must take, subject to that charge, which is partial disposition of it. And the reason that Henry is at liberty to take his part immediately is, because he was originally interested and intended to be benefited by the common fund, which was not the case in respect to the widow; and so, when the purpose is answered as to him, he is entitled to withdraw his part, as the means of making a support.

The costs will be paid out of the fund.

PER CURIAM. Declared and decreed accordingly.

(102)

SAMUEL S. DOWNEY vs. JAMES M. BULLOCK & AL.

Under some circumstances, a trustee, although restricted to the expenditure of the profits of the trust property, may be at liberty to anticipate, by spending, under an emergency, more than the profits of the current year; as if there be a dearth and consequent failure of crops, or some extraordinary sickness, making it necessary to incur heavy medical bills: but, in such case, the evidence of this emergency must be averred and proven, and a full account rendered.

Cause removed from the Court of Equity of Granville County, at the Spring Term 1850.

This was a bill filed by Samuel S. Downey plaintiff, against James M. Bullock, John S. Hunt and Francis Ann, his wife, William B. Hunt, Richard B. Hunt, Leonard H. Hunt, Emily F. Hunt, Lucy B. Hunt, Susannah B. Hunt, and Mary E. Hunt. The bill sets forth, in substance: That William Bullock, late of the County of Granville, departed this life sometime in the year 18—, having first duly made his last will and testament, of which he appointed his son, John Bullock, the sole executor, and which, after his death, was duly proved and recorded, and the said John Bullock duly qualified as executor —that the said testator, in and by his said will, did, among other things, devise and bequeath, as follows: "I give unto my son John Bullock, in trust for the heirs of my daughter Fanny Ann Hunt, the fifteen negroes I put in her possession at her marriage with Capt. J. Hunt, also the tract of land, whereon (103) Capt. Hunt now lives, containing 585 acres. I give the stock of horses, &c., loaned John and Francis, in the same manner to them and their heirs forever, to the heirs proceeding from the body of my daughter, Frances Ann." The bill further sets forth, that, doubts arising as to the construction and difficulties in the execution of the said will, the said John Bullock, the executor, exhibited his bill, in this Court, at —— Term 18—, against the said John F. Hunt, and Frances, his wife, and the legatees and devisees named in the said will, praying that the true construction of the said will might be declared, that he might be directed and pro-

tected by a decree of the Court, in the execution of his trust, and for other relief in the said bill mentioned—that answers having been put in, the said cause was set down for hearing, and by an order of this Court was removed into the Supreme Court for hearing—that the same came on to be heard at December Term 1832 of the said Court, when their Honors declared, that by the words "heirs" and "heirs of the body," in the before recited clause, the testator meant the children or issue of the said Frances Ann, as well those which should come in being after the making of the will as those who were in being at the making thereof, and, in and by the decree containing the said declaration, the said Court directed that the said John Bullock, the executor and trustee, might, if he should think proper, put the property, devised and bequeathed in the above recited clause, into the possession of the said John F. Hunt for the support of his family, and might permit the said John to expend the whole profits for that purpose and for the education of his children. And the bill further sets forth, that the said John Bullock, under the permission granted him by the said decree, did put the said John in possession of the said property, real and personal, and permit him to have the entire control, management and direction thereof, and the said John, being so in possession, continued, for several years and until
(104) the proceedings in this suit had, to superintend and manage the said property, to employ overseers, and to make purchases of clothing, groceries and all other necessaries for and on account of his said family. The bill further set forth, that, about the year 1838, Thomas Hunt, the father of the said John, then residing in the State of Mississippi, and being desirous to have his son with his wife and children settled near him, proposed to the said John to remove to the said State and proposed many arrangements for his advancement and for the comfort and advancement of his family, and the said John, believing that his and their interest would be greatly promoted by such removal, accepted his father's offer; that a difficulty however was found in regard to the negro slaves, which the trustee

had no power to authorize the said John to remove, while, if they should remain, no considerable profit could be expected from their labor and very serious inconvenience would be sustained by Mrs. Hunt and her children for the want of their services as domestics in their new home; that, in pursuance of the wishes of the family, in the said year 1838, proceedings were instituted in this Court, upon which at —— Term of that year a decree passed, appointing the said Thomas Hunt a trustee, in the stead of the said John Bullock, and authorizing the removal of the said slaves to the State of Mississippi, upon certain terms and conditions therein specified. The bill further sets forth, that, in the latter part of that year the said John T. Hunt, acting under the authority of the said Thomas, had made his arrangements for the removal of his family with the said slaves, when an unexpected difficulty presented itself; that the said Thomas Hunt having contracted debts for and on account of his family and as the agent of the said John Bullock, the trustee, upon the faith of the said trust fund, the creditors interposed to prevent the removal of the slaves until their debts were paid (105) or secured; and that the said Mr. and Mrs. Hunt earnestly solicited the plaintiff to become responsible for these debts. The bill further sets forth, that yielding to the entreaties of the said John and Frances Hunt and their friends, and assured that the said Thomas Hunt, the new trustee, would see that he was indemnified out of the trust fund or otherwise, the plaintiff gave a written engagement to become responsible for these debts, provided the same should not be payable before the 1st of June 1842, and afterwards, in pursuance of the said engagement, joined the said John T. Hunt in bonds to the respective creditors for their demands, payable as above mentioned, amounting in the whole to about the sum of $4060; and that the plaintiff, upon executing the said bonds, took from the said John T. Hunt a written memorandum, stating the circumstances, under which the said bonds were given, signed by the said John as agent of his father, Thomas, the trustee; that the said John at the same time placed

in the hands of the plaintiff, to be applied towards the payment of the bonds so given by him as aforesaid, three securities (particularly described in the bill); and that, annexed to the bill, there is a schedule of the bonds by him given and subsequently paid, and that, after applying towards the plaintiff's reimbursement the moneys due upon the said securities, there remains due to the plaintiff as of the date of the 1st of June 1842, the sum of $2,183.27 or thereabouts. The bill further sets forth, that, at the foot of the memorandum so given by the said John Hunt, the plaintiff added a statement of the said three securities deposited with him, as aforesaid, and the application to be made thereof, and signed the same, and the paper, containing the said memorandum and statement, being submitted to the said Thomas Hunt, he endorsed thereupon and signed a written approval of what the plaintiff had done, acknowledging his right to be reimbursed out of the said trust fund, which approval the plaintiff has ready (106) to produce, &c. The bill further sets forth, that the several debts for which his bond were given, as mentioned in the said schedule, were all contracted for just and necessary purposes, properly chargeable and payable out of the said trust fund, (particularly specifying some of them,) and all the other debts, mentioned in the said schedule, were for necessaries furnished to the said family and purchased for them by the said John Hunt, while acting under the authority of the said John Bullock, and, according to the declarations of the said decree, were justly payable out of and chargeable upon the said fund; and the bill proceeded to state, that the plaintiff was advised, that, having, under the circumstances before stated, become bound for the payment of the said debts and having paid the same, he is entitled in this Court to be reimbursed out of the said trust property, because in this Court he is entitled to be substituted to all the rights of the creditors, whose demands he has satisfied, and because, by the payment of the said demands, he has a right in this Court, independently of such substitution, to look to the said fund for his reimbursement. And the bill further set forth,

that the said Thomas Hunt, though at the time of his appointment and the removal of the said slaves, in possession of a large estate, has since become entirely insolvent, and entirely unable in any manner to indemnify the plaintiff, and the said John Hunt was at no time of ability so to do, but was, and yet is, dependent upon the said trust property for his own support: that, since the change in his father's circumstances, the said John Hunt has returned with his family and the said slaves to the County of Granville, where he is now residing; that the defendant James M. Bullock has been duly appointed by this Court trustee for Mrs. Hunt and her children in the place of the said Thomas Hunt, and hath now the charge and superintendence of the real (107) and personal estate, composing the said trust fund, which, under his management, is now producing a larger income than is necessary for the support and maintenance of the said family and education of the children; and that the plaintiff is advised, that, in this Court, he has a right, not only to have the surplus profits of the fund applied to the payment of his demand, but, if necessary, to have satisfaction out of the principal thereof. The bill further sets forth, that the defendants, William B. Hunt, Richard B. Hunt, Leonard H. Hunt, Emily F Hunt, Lucy B. Hunt, Susannah B. Hunt, and Mary E. Hunt, are the children and only issue of the defendants, John F and Frances Hunt, that they are infants, under the age of twenty-one years, personally under the charge of their father, the said John, having no property or estate except the said trust fund, and having no guardian except the defendant, James M Bullock, who, as their trustee, has the possession and control of their said property, and that the plaintiff hath applied to the said James, and requested that his said debt may be allowed, and provision made for the payment thereof out of the said trust property, but that he, though nothing doubting any of the matters herein stated, and though perfectly willing to do any thing, which is just and proper in the premises, yet declines to comply with the plaintiff's request, because of the responsibility, which would thereby be imposed

upon him, and which, as he supposes, he ought not, as trustee, to assume.

The bill concludes with the usual prayer for process, answers, and such relief as the nature of the case may require.

The answer of the defendants was put in by James M. Bullock for himself and the infant defendants. It admits or does not deny most of the allegations in the bill, but it denies that John Bullock ever gave authority to John F. Hunt to contract any debts on the (108) faith of the trust estate, and avers that this was well kown in the neighborhood and particularly to the plaintiff. It denies that the plaintiff signed the bonds, with any reliance upon the trust property for his indemnity, but avers that he signed them upon the personal responsibility of John F. Hunt, who was then in good circumstances, and who also gave the plaintiff counter security in some form or other. It also denies that the debts mentioned by the plaintiff were contracted except a very small portion of them if any, for the benefit of the cestuis que trust.

Replication was entered, depositions taken and the cause set for hearing and transmitted to the Supreme Court.

J. H. Bryan and *Littlejohn*, for the plaintiff.
Gilliam and *McRae*, for the defendants.

PEARSON, J. From the proofs we are satisfied, that much the larger part of the amount, for which the plaintiff became bound, were debts of John Hunt contracted for his own purposes, and not for the support and education of his children, or for expenses incurred on account of the slaves.

We are also satisfied, that the plaintiff assumed the liability, trusting for indemnity to the notes, which were put into his hands, and to the guaranty of Thomas Hunt, and that this is an attempt, upon the failure of said Hunt, to fall back upon the trust fund, which was not before looked to.

But apart from these considerations, the case made by

the bill is fatally defective. "By a decree of this Court, it was directed, that John Bullock (then acting as trustee,) might, if he should think proper, put the trust fund into the possession of John Hunt for the support of his family, and might permit him to expend the (109) whole profits for that purpose, and for the education of his children." The fund, consisting of a platation, and some twenty or thirty negroes, with a stock of horses, cattle, household furniture, &c., was put into the possession of John Hunt. He had the entire control and management of it, and was at liberty to apply the whole of the profits to the support and education of his children, all of whom were then quite young. This state of things continued for some five years, when, in 1838, Thomas Hunt was appointed trustee in place of John Bullock, with a view to the removal of the said John Hunt and his family, and of the negroes, forming the most valuable part of the trust fund, to the State of Mississippi. The plaintiff alleges, that, at that time, John Hunt had incurred debts for and on account of his children, and the necessary charges in respect of the negroes, to the amount of $4,060, over and above the whole profits of the trust fund: and that he, out of friendship for the wife and children of said Hunt, (the cestuis que trust,) became bound for the payment of the several debts, making the above amount, in order to enable Hunt to take the negroes to the State of Mississippi.

The funds in now in the hands of another trustee, James W. Bullock, one of the defendants: and the plaintiff seeks to charge it with the sum he has been obliged to pay. It is clear, he must make out his equity by and through John Hunt, for whom, and at whose instance, he became bound.

John Hunt alleges, that he exceeded the profits of the fund some $4,000, but he exhibits no account, and, for aught that appears, he kept none, so as to show what was the amount of profits received, and how it was expended, and by what means he was obliged so far to overrun his limit. This is the fatal defect in the bill. Upon its face it shows, that Hunt, in whose shoes the

plaintiff stands, has been guilty of gross negli-
(110) gence or of downright extravagance. It would be extravagance thus to exceed the income of one's own property—much more so in regard to a trust fund: and still more so, when there is an express restriction to the profits of the fund; and yet, without any account or attempt at explanation, the plaintiff seeks to follow and charge the trust fund. There is no principle of Equity, upon which the bill can be sustained.

It may be true, that, under some circumstances, a trustee, although restricted to the expenditure of the profits, may be at liberty to anticipate by spending, under an emergency, more than the profits of the current year; as if there be a dearth and a consequent failure of crops, or some extraordinary sickness, making it necessary to incur heavy medical bills: but, in such case, the existence of this emergency must be averred and proven and a full account rendered.

The bill must be dismissed at the plaintiff's cost.

PER CURIAM. Decree accordingly.

Approved. Motley *v.* Motley, *post*, 211; Hussey *v.* Rountree, 44 N. C., 110; Patton *v.* Thompson, 55 N. C., 411; Freeman *v.* Bridgers, 49 N.C., 1.

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(111)

NANCY HARRIS & AL. vs. HERBERT HARRIS & AL.

A feme covert, entitled to a separate estate in personal property, unless there be some clause of restraint of her dominion, may convey it and do all other acts in respect to it, in the same manner, as if she were a feme sole, whether a trustee be interposed or not.

PEARSON, J., dissented.

The cases of *Dick* v. *Pitchford*, 21 N. C., 480; *Miller* v. *Bingham*, 36 N. C., 423; *Frazier* v. *Brownlow*, 38 N. C., 237, and *Newlin* v. *Freeman*, 39 N. C., 312, cited and approved.

Cause transferred from the Court of Equity of Rutherford County, at the Spring Term 1842.

Upon the pleadings and proof the following case appeared:

On the 11th of May 1835, Frederick Ward conveyed

a negro girl, Jinny, to Thomas Ward, "in trust to and for the separate use of Nancy Harris, the wife of William Harris, and free from any control of the said William, during the natural life of the said Nancy, and upon the death of the said Nancy upon further trust to hold the said negro and her increase to the sole and separate use of Elizabeth Ledbetter, the wife of Richard Ledbetter, and Sally, the wife of John Scorey, both to be equally interested in said trust: and upon the happening of the death of the said Elizabeth or Sally or both, the said Thomas is to hold the said negro and her increase for the benefit of their children: one half to the children of Elizabeth and the other half the chil-
(112) dren of Sally." Elizabeth Ledbetter and Sally Scorey were the daughters of William and Nancy Harris. The negro girl was in the possession of Harris and wife; and, in March 1838, William Harris, being much indebted and judgments rendered against him for debts for which his sons-in-law, Ledbetter and Scorey, were bound as his sureties, William Harris and his wife, Ledbetter and his wife, and Scorey and this wife sold the negro woman and one of her children, then six months old, to the defendant, Herbert Harris, for the price of $700, and those six persons made a deed to said Herbert for them, with a covenant of general warranty: and he took them into his possession. He paid the consideration money partly in discharge of the debts mentioned, partly to William Harris, and partly to Ledbetter by the direction of the other vendors. Scorey and wife have four children; and in September 1841 this bill was filed by Mrs. Harris, Mrs. Ledbetter, Mrs. Scorey, and her four children, against Herbert Harris, William Harris, Ledbetter, Scorey, and Thomas Ward, and charges that Herbert Harris knew of the existence and contents of the deed made by Frederick Ward, and that, with such knowledge, he purchased the negroes from William Harris for an inadequate consideration, and that, supposing that he could make his title good thereby, he, by pursuasions and false suggestions and promises and undue influence and control over them, caused and procured the plaintiffs, Nancy, Elizabeth and Sally,

and their husbands to sign the deed for the slaves—Ledbetter being induced to do so by receiving a part of the purchase money, and the said Scorey by getting to himself another child of Jinny, then in his possession. The prayer is, that the defendant, Herbert, may be compelled to surrender the slaves and their increase and account for the hires, so that the purposes of the deed of settlement may be performed, and for general re-
(113) lief. The answer of Herbert Harris denies all the allegations of fraud and undue advantage, sets forth the terms and purposes of his purchase, and the conveyance to him, and insists on his title thereby acquired.

Guion, for the plaintiffs.
Bynum, for the defendants.

RUFFIN, C. J. The plaintiffs have failed to establish any extraneous circumstance to impeach the conveyance to the defendant. Indeed, the allegations of the bill are expressed in such general terms, that one must suppose that no relief could be expected on them; and that it was intended to put the relief on the ground, that the conveyance by a married woman of a slave, held by a trustee to her sole and separate use, is inoperative. The opinion of the Court, however, is to the contrary; and we hold that a feme covert, entitled to a separate estate in personal property, unless there be some clause of restraint of her dominion, may convey it and do all other acts in respect to it in the same manner, as if she were a feme sole. That is the settled law of the Court of Equity in England, and was, long before the revolution; and it is therefore obligatory upon the Courts here, just as much as any other established rule of property, derived from our ancestors. To go no further back, it was unquestionable law in Lord Hardwicke's time. In Peacock v. Monk, 2 Ves. 191, he points out the difference in that respect between real estate, and personalty, or the profits of real estate, which in fact is personalty and goes to the executor; and he gives the reasons for the difference. As to personal property, he

says, where the wife has a separate use in it, "she may dispose of it by an act in her life time or by will. She may do it by either, though nothing is said of the manner of disposing of it"—that is, in the settlement, or articles. That has never been denied in England (114) from that day to this, though the grounds of the rule have been often stated in subsequent cases, and the principle itself more distinctly explained. In Fettiplace v. Georges, 1 Ves. Jr. and 3 Bro. C. C. 8, it was, for example, stated in terms, that personal property, settled or agreed to be settled to the separate use of a married woman, may be disposed of by her as a *feme sole* to the full extent of her interest, although no particular form for doing so is prescribed in the instrument. The principle of that rule is, that she takes separate property as hers exclusively, with all the rights and incidents of property; of which one, and a most important one, is the right of disposition. This principle has been applied to all cases since, in whatever form they may have arisen. Thus she may convey personalty in which she is entitled in a separate use in reversion, as well as a present interest. Sturgis v. Corp 13 Ves. 190. She may sell or give even to her husband, since in respect of that property they are regarded as distinct persons, like other strangers: though the Court will scrutinize such dealings upon a natural suspicion of actual constraint on her. Powlet v. Delavet, 2 Ves. 663. Squire v. Dean, 4 Bro. C. C. 326. She may not only convey her separate property, but, without the consent of her husband or trustee, she may encumber it by mortgage, or charge it by contracting debts, as by giving a bond for so much money merely. Fettiplace v. Georges, and Halme v. Tenant, 1 Bro. C. C. 16, 2 Dickens 560. Other instances need not be cited as evidence, that, in the last case, Lord Thurlow laid down the rule as correctly as he did explicitly, which he took from Peacock v. Monk, that a feme covert, acting in respect of her separate personal property, is competent to act in all respects as if she was a feme sole. He says, it was impossible to say the contrary. Now, beyond all controversy, the ground of that rule is not any capacity or

power supposed to be imparted to a married wo-
(115) man by her husband or by the instrument, creating the separate use, as a capacity or power thereby creating and subsisting by itself apart from the property; but it arises out of the ownership of the property, and the right such absolute ownership imparts to the person, to do with it as she pleases. When equity adopted the principle, allowing that separate property might be vested in a married woman, which the law denied, it followed, as being inherent in the jus proprietatis, that there should be the jus disponendi. That is declared in all the cases to be the principle; and there is no contradiction among them. Even when a gift is made in general terms to the sole and separate use of a feme covert, and the instrument goes on to add, that she may dispose of it in some particular manner, as by deed or will, yet she may do so in any other manner, by reason of her general property, in which the power is merged. Elton v. Sheppard, 1 Bro. C. C. 532. Hales v. Margerum, 3 Ves. 299. Such being the nature of a feme covert's right to dispose of her separate property —conferred by equity, not created by the settlor—the doubt was, whether any restraint upon the right of alienation by the provisions of the deed was admissible. Upon principle, it, unquestionably, was not; because the common law denies such a restriction, and in respect to equitable estates the general rule is, that equity follows the law. But this anomaly was admitted by the Court of Equity, in order the more effectually to protect the wife from the control or solicitations of her husband, and thereby make the separate property a more effectual provision. As was observed by Judge Gaston, in Dick v. Pitchford, 21 N. C. 480, the controversy upon that point is settled by authority in England in the cases cited by him. But that very controversy only shows more conclusively, that, but for provisions in the instrument in restraint of the anticipation of profits or alienation of te capital, the right of disposition existed
as an absolute right belonging to the owner of
(116) the property. Is there any reason, why the Judges of this Court should not hold the law to

be the same here: or, rather, why we should not be obliged so to hold? There seems to be none whatever—no plausible ground for setting up a new rule upon their own arbitrary will. If there had been any legislation on the subject, at all incompatible with the law our ancestors brought with them: if there were any thing in those rules repugnant to or inconsistent with the form of government, as it is expressed in the statute, respecting the parts of the common law to be in force here, then the Judges ought to conform and mould the rules to correspond, by proper qualifications. But we are not aware of any such legislation or repugnancy. On the contrary, the Courts of this State have heretofore proceeded on the idea, that they were to administer the law upon this subject, as they found it, as in other instances. In Dick v. Pitchford, just quoted, this doctrine of equity is recognized, and used as illustrating the question then before the Court, which was the right of a male cestui que trust to assign the trust fund, though, by the terms of the deed, the trustee was to apply the profits annually to his use. In other cases of creditors, seeking satisfaction out of a trust fund, intended to be tied up beyond the control of an improvident cestui que trust, it has been said, that the only instance, in which such a provision could hold, was in that of a married woman: thus implying that, without the provision, there would be no restraint on her. Again, so far from considering the separate property of a married woman susceptible of transfer, under the idea of her executing a power, it was held in Miller v. Bingham, 36 N. C. 423, that, when property was thus conveyed during the marriage of a feme, the separate use itself ceased ipso facto, upon the determination of the coverture, and was converted into an ordinary trust for the feme, and so vested in her second husband. And in Frazier v. Brownlow, 38 (117) N. C. 237, the general principle was declared, as derived from Hahne v. Tenant, and other cases, that debts contracted by a feme covert, in reference to her separate personal property, bound such property in the hands of her trustee, and satisfaction of the debt was decreed out of slaves held to Mrs. Brownlow's sep-

arate use, though the deed for the slaves contained no power to her to charge debts or alien. Let it not be said, that the slaves were the produce of the profits of the land, which were at her disposal, and therefore that the creditors had a right to follow those profits in the slaves, in which they were invested. That was not the principle of the decree or of the opinion given. On the contrary, the relief proceeded simply and exclusively on the fact, that the slaves were purchased and held by the trustee to her separate use.—In Newlin v. Freeman, 39 N. C. 312, it was expressly held, that the circumstance of the investment of the wife's separate money in other property can have no effect, and that the property thus purchased will be treated, as if it had been derived in any other manner: that is, that its nature will depend on the nature of the conveyance taken for it. In that case, accordingly, land, which was bought with the separate money of the wife and conveyed to a trustee for her, but not to her separate use, and without a power to her to devise it, could not be disposed of by her will, though the marriage articles authorized her to devise the land she had at the marriage and also all her personal property. Besides, how does she get the right to dispose of the profits more than the capital? If it be said, that the perception of the profits is the use given to her, the answer is, that the use secured to her is as much the use of the capital as of the profits: all consisting of property the same in kind, namely, personalty, and therefore each must be equally at her disposition. It is clear, therefore, that Frazier v. Brownlow proceeded upon the general principle, that, as to separate personal property, the lady was a feme sole,
(118) and therefore equity would lay hold of that property for the benefit of her creditors—at least where she charged the debt on it. If, in that case, after purchasing the slaves with her own money, she had taken the conveyance to herself or to a trustee for her simply, and not expressing it to be for her separate use, there can be no doubt but they would have belonged to the husband. But, when she took a deed to a trustee to her separate use, then, without any regard to the source

from which the purchase money was derived, the slaves, as her separate personal property, and, as such merely, were charged with her debts and became liable to be sold for their satisfaction, as an incident of ownership, as legal personal property, may be taken at law by execution. That case is, therefore, a precise authority, that, in respect to such separate property, a married woman is held here, as in England, to act as a feme sole. Hence, if the Courts here had been at liberty formerly to pay no respect to the principles so long settled in the mother country and to invent a new system for use here, it seems clear, that, upon every principle on which judicial precedents obtain authority, the series of dicta and decisions in this State should be conclusive with the present Judges. It is said, indeed, that a contrary course has been followed in some of our sister States. But, we believe, not after many adjudications had been made conformably to the old law. In New York, it is true, that it was once held, that a married woman was not to be deemed a feme sole in respect to her separate property, save only sub modo and to the extent and in the manner prescribed in the instrument creating the estate. Methodist Church v. Jaques, 3 John C. C. 78. But even the authority of Chancellor Kent's great name could not uphold that position; and, upon appeal, the decree was reversed in the Court of Errors upon the opinions of the most eminent Judges. 17 John. Rep. 548. Since that time, by various judgments of the (119) Court of Errors and Chancellor Walworth, the old doctrine is re-established in its integrity. In South Carolina it seems to be settled otherwise, it must be admitted. But that seems to have been upon the authority of an early case in that State, Ewing v. Smith, 3 Dessaus 117, reversing a decree of Chancellor Dessaussure founded on full research into the cases on this subject and their reasons. It is true that Judge Harper, in Reid v. Lamar, 1 Strob. Rep. 27, speaks of the restriction on the right of the feme to dispose of her property except under an express grant of power, as more in conformity with the policy on which the right of separate property to the wife was allowed in equity. But

he means only thereby, that it the better protects the interests of the wife, and not that it is against the public policy, that a married woman should have the right of disposition. He could not mean the latter; for, if that were true, then even the most express grant in the settlement would not confer the power, since the law never suffers the acts of parties to defeat its policy. Yet he admits and no one can deny, that at all times a married woman has been capable of executing a power, and that for her own benefit as well as that of another. And the late Mr. Justice Story, subsequently to all the American adjudications, states the old rule of equity as being yet the rule, without any qualification from those decisions. 2 Story's Eq. s. 1389, et seq. It is in fact, then, not a question of policy, but simply a question of construction of the instrument creating the estate: Whether, when it conveys property to the separate use of a married woman, it means to restrain her right of alienation, as incident to ownership, when it expresses no restraint, or only when the intention to restrain is declared in the instrument. It might have been contended, with some apparent reason, to be against the policy of this country and the habits of our domestic relations, to allow separate equitable property in a wife, at all. But it is too late to think of that; and it
(120) is, moreover, altogether a different question from the present. Being allowed, the dispute now is as to the meaning of the instrument. This dispute is, therefore, merely as to the form of conveyances or agreements for the separate use of the feme covert, and does not in the least concern the policy of the law or the institutions of the country—since, by express provisions, the parties may undoubtedly confer the power of disposition or restrain it. That being the true nature of the question, it would seem to be too much like unsettling the forms of conveyances and the rules of property to say, contrary to a very old rule of construction, that the parties intended to restrain alienation, though they do not say so. It is enough to fetter an owner, when the donor says, he does not mean she shall dispose of the property, but only enjoy the profits during her cover-

ture or life. Suppose a parcel of chargeable or sick slaves to be a married woman's separate property and all her property. How are they to be fed, clothed, or cured, unless debts can be contracted on their credit, or some of them may be sold? Yet upon the doctrine, that she can move only under a power, she is perfectly helpless, and the slaves must be left to their fate of destitution or death; or an exception must be admitted, which shows that there is either no general rule, or one to which exceptions may be arbitrarily allowed, without regard to the supposed meaning of the deed and intention of the parties.

The plaintiffs, therefore, who are married women, are concluded by their deed, which in this Court is considered as passing all their estate; and, as no relief is sought except against the deed, the bill must be dismissed with costs.

PEARSON, J., Dissent. The doctrine of the English cases is, that a married woman, in regard to property secured for her separate use and maintenance, is, (121) in all respects, to be considered as a feme sole, and has the absolute right of disposition by sale or will.

A different doctrine is established in almost all of the States of the Union; and it is held, that, in regard to her separate estate, the wife is considered as a feme covert, subject to all the common law disabilities, except so far as she can derive a power under the settlement, by its express provisions, and except so far as the right to receive and apply the profits for her maintenance. See White's leading cases in Equity, and the cases there cited, in note, pages 370—73.

I consider the question open in this State; for, although the English doctrine has been incidentally alluded to with approbation in several cases, it was not necessary to adopt the doctrine of implied powers, inasmuch as, in those cases, an express power was given. Whenever it is unnecessary to decide a point, the decision ought not to be taken as an authority, for this plain reason, there is no occasion to contest it, and it is, there-

fore, not "turned over and over" and looked at in every point of view, as it would be, if the case turned on it. Hence, I object to any modification of our law, or to the adoption or building up of any doctrine, by force of obiter opinions, no matter how often they may be repeated.

The case of Frazier v. Brownlow, 38 N. C. 237, is nearer being an authority than any other; but there the Court goes further than the facts of the case called for, and it is an authority only to this extent, if the profits of land be secured for the separate use and maintenance of a married woman, she may, with the assent of her husband, charge such profits for a debt, admitted to be for articles furnished for the maintenance of herself and family.

The negroes in that case were held by the trustee in the room and stead of the profits of the land, which he had invested in negroes; and he held them pre-
(122) cisely as he would have held the accumulated profits of the land, had he put the money in his desk, or made a deposit of it in bank, so that the feme might use it as her necessities required.

So, in this case, as the feme had only a separate use for life in a negro woman, who was having children and was, therefore, of no annual profit, and as, for her maintenance, she had a right to dispose of the profits, and a life estate is only in fact a right to the profits, I should have been willing to put this case upon the ground, that, in disposing of her life estate, she disposed of the profits only.

But the general doctrine was much discussed in this case and in the case of Whitfield v. Hurst, and my brother Judges have concluded to announce the English doctrine, in all of its generality as to implied powers, in relation to the separate estates of married women, and I feel constrained to dissent.

I adopt the American in preference to the English doctrine, upon these grounds: It is more consistent with the "reason of the thing." It makes a less departure from the ordinary principles of law: and it is more suitable to the habits and customs of the people of our State.

First: "The reason of the thing." The common law considered the wife as merged in the husband, so as to be in law but one person. The evil is, that husbands, thus acquiring the ownership and right of disposition, may be improvident, and, by voluntary alienation, or debt, dispose of all the property and leave wives destitute and without maintenance. The remedy is, to set apart a fund for the separate use and maintenance of the wife; which fund the husband cannot sell or make liable for his debts. The evil is remedied by disabling the husband; and as a remedy for the evil, there is no sort of necessity to go further and enable the wife, by taking away her legal disability and setting her (123) up as a feme sole, with power to act and deal independent of her husband, to be a free trader or to deal in goods, wares and merchandise.

Wives are as apt to be improvident as husbands; and it is against "the reason of the thing" to disable the husband and enable the wife, by implication, to become a free trader, as a feme sole. One evil is avoided by falling into another. To remedy this second evil, a learned Chancellor of England suggested, that there ought to be in the settlement a restraint against alienation or anticipation on the part of the wife. Thus, a power is created by implication, which it is necessary to restrain by an express provision; in other words, there is a "wheel within a wheel," and the machinery is made so complicated, that no two Chancellors ever make it work in the same way.

Secondly. It makes a less departure from the ordinary principles of law. While it admits, that the protection of married women makes it necessary to depart from the rules of the common law, so as to allow property to be vested in a trustee for the separate use and maintenance of the wife, and thereby give her the use of the profits, and to disable the husband from all right to control or dispose of such property, it is careful not to make a greater departure than the necessity of the case calls for, and it only allows the wife to dispose of the property, when she has an express power to do so by will or otherwise.

On the contrary, the English doctrine makes an entire departure, and, in regard to her separate estate, the wife, in equity, is to all intents and purposes a single woman and a free trader, with implied powers to make a deposition by sale or will, as if she was not married.

When a husband agrees to give up his right of disposition in reference to certain property, and devotes it to the separate use and maintenance of the wife, so as to put it beyond any contingency, as regards his (124) own acts, how does it follow, that, because he is disabled his wife becomes enabled to dispose of the property?

It is said, the right of disposition is an incident of ownership. That is true; unless the owner is under a legal disability. Admit that the wife is the owner. She is not capable of disposing, because she is under disability; and the remedy for the evil, as above suggested, is to disable the husband, and not to remove the disability of the wife.

But is it true, that the wife does become the owner?

There is no necessity for it, because the evil is remedied by allowing the property to be held for the purpose of her maintenance, and to be the property of the husband, subject to this trust. If it be the intention, that it should not only be subject to this trust, for the maintenance of the wife, but that she should have the right to dispose of it by will or deed, let the husband give his consent by an express power in the settlement. This would be but a slight departure from the common law, which allows a wife to dispose of her personal property by will, provided the husband gives his consent. In the absence of an express power, I am at a loss to conceive any ground for implying a power, which is not necessary to carry out the purpose of the settlement, to-wit, "the maintenance of the wife." I here repeat what is said before. A wife may be improvident as well as a husband; and the rule, by which she acquires by implication a right to charge and sell and dispose of the property, makes it necessary, in order to protect her from her own improvidence, and from the influence of her husband, to insert a clause restraining her from aliena-

tion or anticipation: thus making it necessary to violate one rule of the common law, in order to get relief from an implication, which violates another rule of the common law; thus making a complicated system of implied powers and restraints, wholly at variance with the common law.

Thirdly. It is more suited to the habits and cus-
(125) toms of the people of our State.

We have happily refused to adopt the English doctrine of "a part performance of a parol contract," and the doctrine of "alien" by a vendor, who had executed a deed, for the purchase money, and the doctrine of "a wife's equity for a settlement," "because it is not the policy of our law to encourage separate estates," and the doctrine, that purchasers from trustees are bound to see to the application of the purchase money. Having rid ourselves of these four refined, complicated, and artificial doctrines of the English system of equity, I was in hopes, that we had also got rid of the doctrine of implied powers, in regard to the separate estates of married women; which involves the idea of a married woman being, to all intents and purposes, a feme sole, in regard to her separate property—an idea, which, according to the principles of law that I have imbibed, I am unable to comprehend, apart from an express power of appointment.

It is believed, that the effect of the doctrine of England, by which property is not only set apart as a fund for the maintenance of the wife, free from the control of the husband, but the wife, in regard to the fund, is made a free trader and is looked upon as a feme sole, has not been attended with very happy consequences upon the state of society, because it has produced a complicated relation, very different from the simple state of "man and wife," as it existed at common law—one person joined together for "better or for worse"—and the English Reports are filled with more cases of divorce, and alimony, and crim. con. than, I trust, will ever be found in the reports of North Carolina. So far, wives in North Carolina have set up no pretentions to be free traders, although an estate was settled for their separate

use and maintenance, and they have never attempted to make a will, unless there was an express power.

This complicated system of implied powers and (126) restraint is totally at variance with the policy of our country, and for that reason has been repudiated by our sister States, who have adopted, in its stead, the plain and simple idea, that the husband is disabled, but the wife is not enabled, except so far as the deed or will confers an express power.

As the doctrine has been discussed at large, I think it proper to notice a distinction, which may be taken, between a right to sell for the purpose of maintenance, and a right to dispose by will or by gift. Under the countenance of a Court of Equity, and to guard against the improvidence of the husband, a fund may be set apart for the maintenance of the wife, contrary to the rule of the common law. Suppose such a fund is set apart, and admit that in some cases (as in the case under consideration) it is necessary to sell, (or to charge by way of anticipation of the profits,) the current profits not being sufficient for the maintenance of the wife, and that, for this purpose, from the necessity of the case, a right to dispose of the life estate is implied, does this reason extend, so as to make an implication of the right to make a will? It is not necessary for maintenance; and the right to make a will, if such was the intention, ought to have been expressly conferred. So there is a clear line of distinction between the right to sell, especially a life estate, which may be necessary to make the fund available, and the right to make a gift or to dispose of it by will, which I believe, ought not to be implied, and should be conferred by express power.

PER CURIAM. Bill dismissed with costs.

Approved. Williamson *v.* Williamson, 57 N. C., 281; Harris *v.* Jenkins, 72 N. C., 183; Hardy *v.* Holly, 84 N. C., 661; Kirby *v.* Boyette, 118 N. C., 260.

Questioned. Knox *v.* Jordan, 58 N. C., 176.

(127)

ELIAS TURNAGE & AL. vs. CHRISTIANA TURNAGE & AL.

A gift by will of a negro woman and her increase does not include the children born in the life time of the testator.

Where there are no debts due from an estate, it is the duty of the executrix to pay the legacies, without waiting for the expiration of two years from the death of the testator.

The statute allows two years to executors and administrators to settle estates, upon the supposition, that many estates which are complicated cannot be settled in less time; but this is intended as an indulgence to them, and was by no means intended to confer on the residuary legatee the right to have the fund put out at interest for his benefit.

The cases of *Cole* v. *Cole*, 23 N. C., 460, and *Stutz* v. *Kizer*, 37 N. C., 538, cited and approved.

Cause removed from the Court of Equity of Greene County, at the Fall Term 1850.

This was a bill filed against an executrix for a settlement of the estate of her testator. The facts, upon which the questions submitted arose, are sufficiently stated in the opinion delivered in this Court.

Rodman, for the plaintiffs.
J. W. Bryan and *Washington*, for the defendant.

PEARSON, J. Travis Turnage, by his will, gives to his wife, Christiana, a negro woman, Amy, and all her increase, and, after giving her several other ne-
(128) groes, notes and other property, he adds, "and one negro woman, Phillis, and her increase." Before the death of the testator and before the making of the will, Amy had a child named Holland, and Phillis a child named Tilman. By the 10th clause of the will, the testator gives to his brother Elias Turnage, "all the balance of my negroes, which I have not disposed of, and all of my notes after the other shares are drawn out."

The first question raised is, whether Holland and Tilman are bequeathed to Christiana, or fall into the residue and pass to Elias Turnage. This question is settled by many adjudications. The will takes effect and speaks from the death of the testator, unless a different

intent is expressed; consequently, a gift of a negro woman and her increase is taken to mean, such as she may afterwards have; and in this view, there can be no difference, whether the words are, her increase, or all of her increase, because the words apply only to such as she may afterwards have. This point is settled and need not be elaborated again. Cole v. Cole, 23 N. C., 460; Stutz v. Kizer, 37 N. C., 538.

Christiana Turnage, the executrix, on the 20th of January 1847, delivered to Elias Turnage, two negroes, King and Nice, and took from him a receipt under seal, which admits, that he had received all the negroes bequeathed, except John, in whom Christiana had a life estate. It is insisted for Christiana, that this deed is a release and bars all claim on the part of Elias to the slaves Holland and Tilman. On the contrary, Elias alleges, that it was a surprise on him, and that he executed the release under a mistake and in ignorance of his rights. It is a clear case of surprise. Being entitled to four negroes, he receives two of them, and executes a receipt in full. If the two received had been other than those he was entitled to and of more value, it might have been amounted to a satisfaction; (129) but, as they were two of the four, it is impossible to hold, that it was in satisfaction of the four. As to the two not delivered, there has been no kind of consideration for the release, and it is not against conscience to insist upon having these two also, the receipt in full to the contrary notwithstanding.

A reference was made to the Master in the Court below, who reported, that assets, to an amount exceeding $6,000 in good promissory notes, bearing interest, due the testator, came to the hands of the executrix, upon which sum he has charged interest up to the 8th of October 1849; in all $7,041.40. He has credited the executrix with two notes specifically bequeathed, and $1,200 in other good notes given to her, and with various pecuniary legacies paid by her, and has allowed interest from the dates of the several payments up to the 8th of October 1849; and he has also allowed vouchers for payment of debts and funeral expenses, amounting to

$129.32, upon which he has given interest from the date of the several payments to the 8th of October 1849.

The plaintiff, Elias Turnage, filed two exceptions, which raise the question, whether the executrix was entitled to the allowance of interest on the legacy to her of $1,200 in other good notes, and on the pecuniary legacies, until after the expiration of two years from the probate of the will. As she is charged with interest on one side of the account, it is right that she should be credited with interest on the other side, provided the legacies were not paid before they were due. That raises this question; as the executrix had the funds in hand and there were no debts against the estate, was she at liberty to pay the legacies forthwith and settle the estate? Or was it her duty to keep the fund at interest for two years, merely for the purpose of accumulation,

(130) by way of interest, for the benefit of the residuary legatee? The statute allows executors and administrators two years to settle estates, upon the supposition, that many estates are complicated and cannot well be settled in less time. This, however, is intended as an indulgence to them, and was by no means intended to confer on the residuary legatee the right to have the fund put out at interest for his benefit. In this case, as no time is fixed on for the payment of the legacies, they were payable forthwith; and, as the condition of the estate did not require delay, the executrix was not only at liberty, but it was her duty, to pay them as soon as she had funds in hand. In fact, the legatees might have sued within the two years, and under the circumstances the Court would have decreed the legacies to be paid.

The exceptions are overruled. It must be declared to be the opinion of the Court that the plaintiff, Elias Turnage, is entitled to the slaves, Holland and Tilman, and the costs must be paid by the defendant.

PER CURIAM. Decree accordingly.

1st par. head-note—*Approved.* Young *v.* Young, 56 N. C., 216.

3d par. head-note—*Approved.* Skinner *v.* Wynne, 55 N. C., 41; Beasley *v.* Knox, 58 N. C., 1; Clements *v.* Rogers, 91 N. C., 63.

Equity will relieve against surprise (omitted from head-note). *Approved.* Motley *v.* Motley, *post*, 211; Allen *v.* Bryan, *post*, 276; McWilliams *v.* Falcon, 59 N. C., 235.

(131)

JOHN SKINNER & AL. vs. MARY M. WOOD & AL.

A., by one clause of his will, devised as follows: "I leave to J. S. W. the use of the lot and improvements, whereon he now lives, until my son C. arrives at twenty-one years of age, or for four years after my death; then I wish them sold, and the amount divided among, &c., on condition that he, the said J. S. W., will keep them in repair, and assist my wife in the management of the farm and settlement of my estate." In another clause, the testator says, "I hereby nominate and appoint my wife M., and my son C. W. W, executrix and executor to this my last will, (C. to qualify when he arrivves at twenty-one years of age)." And again the testator says, "I request the favor of my nephew, J. S. W., to attend to and assist my wife in her business, until my son C. becomes capable of doing so, or longer, if necessary, and to employ other counsel and advice, when necessary, for which I wish her to compensate him." The will was made in July, 1846, the testator died in January, 1848, and his son C. arrived at age in March, 1850. *Held*, that the devise to J. S. W. was only as a compensation for his services until C. arrived at age and qualified as executor, and that J. S. W.'s interest in the house and lot terminated at that period.

Cause removed from the Court of Equity of Perquimans County at the Spring Term 1850.

This was a bill filed by certain devisees of John Wood, deceased, claiming to have sold some lots and improvements in the town of Hertford, directed by the will to be sold for a division among these devisees. The only objection made to the claim of the plaintiffs arose upon the construction of the will: the defendant, John S. Wood, contending that he was entitled to the use of this property for four years after the death of the tes-

(132) tator. The clauses of the will and the facts connected with the question are stated in the opinion delivered in this Court.

Burgwin, for the plaintiffs.
No counsel for the defendants.

PEARSON, J. In the will of John Wood there is this clause: "I leave unto John S. Wood the use of the lots and improvements, whereon he now lives, until my son Charles, arrives to twenty-one years, or for four years after my death: then I wish them to be sold and the amount equally divided among my grand children by

my daughter, Emily Skinner, on condition, that he, the said John S. Wood, will keep them in repair, and assist my wife in the management of the farm and settlement of my estate." And, after several other bequests and devises, there is this clause: "I hereby nominate and appoint my wife, Mary M. Wood, and my son, Charles W. Wood, executrix and executor to this my last will, (Charles to qualify when he arrives at twenty-one years of age); and I wish my wife to act as testamentary guardian until he arrives at that age."

"I request the favor of my nephew, John S. Wood, to attend to and assist my wife in her business, until my son Charles becomes capable of doing so, or longer, if necessary, and to employ other counsel and advice when necessary, for which I wish her to compensate him."

The will was executed in July 1846, at which time the testator was in feeble health, but he recovered and lived until January 1848. Charles Wood arrived at the age of twenty-one in March 1850. The plaintiffs are the children of Emily Skinner: and they insist, that the interest of John S. Wood, in the lot, &c., ended when Charles arrived at age. The defendant, John S. Wood, insists, that he is entitled to the use of the property for four years after the testator's death.

The use of the property was intended as com-
(133) pensation for the services of John S. Wood. These services would be required until the son arrived at full age and qualified as co-executor with his mother. We can therefore see a reason for giving the use of the property until that time, viz., to make the compensation co-extensive with the period, during which the services were to be performed.

But we are unable to conceive of a reason for giving the use for four years after the testator's death. Why not for two, three or five years? This is not a pure gift, but is a compensation for services to be rendered; and it will not do to reply, that a testator may give as he chooses, and we have no right to ask, why? or to examine into the cause moving to the gift, for the purpose of ascertaining its extent.

At the date of the will, supposing the testator im-

agined his death near at hand, the two periods fixed on are the same. He lived nearly two years thereafter, and this circumstance makes the two periods differ widely, and renders it necessary to adopt one and reject the other.

But the last provision relieves the question from all doubt. He requests John S. Wood to assist in managing the business, until his son becomes capable of doing so, or longer if necessary, for which he directs "his executrix to compensate him." If the use was to be for four years after his death, there would be compensation for two years longer than he hoped the services would be necessary, and for these two years the compensation would be double—one, by the use of the property, and another, that which the executrix is directed to make. Whereas, if the compensation, provided by himself, terminates when his son arrives at age, it is consistent to direct his executrix to make compensation, in the event that the services should be required for a longer time.

It must be declared to be the opinion of the Court, that the gift to John S. Wood terminated when
(134) Charles Wood arrived at the age of twenty-one years. There must be an order for a sale of the property, and a reference to take an account of the rents and profits since that time.

PER CURIAM. Decree accordingly.

ALSTON A. JONES & AL. vs. WILLIAM B. HURST.

By marriage articles, it was stipulated that, "all the right, title and interest of the property, now belonging to S. (the intended wife) shall not be changed or so altered as to become subject to the control of J. (the intended husband), as respects being subject to the payment of any debts of the said J., which he may now owe or may hereafter contract in any way whatever, or be subject or liable to be sold by the said J. to his use and benefit, without the consent of the said S. Nevertheless the said J. has full power and authority to and the property of the said S. at all times in such manner as shall be most conducive to the said S. and that a reasonable portion of the property as aforesaid shall be made use of by the said J. for the better support of the said S." *Held*, that the wife had no power, by virtue of these marriage articles, to dispose of the property by will.

Cause transmitted from the Court of Equity of Wayne County, at the Spring Term 1850.

This bill was filed in September 1849, by Alston A. Jones, calling himself administrator with the will annexed of Sarah B. Hurst, and by William A. Whitfield against William B. Hurst, administrator of John B. Hurst.

The bill alleges, that sometime in 1836, Sarah B. Whitfield, the testatrix, and John B. Hurst, intestate of the defendant, being about to intermarry, it was agreed between them, that all the property of (135) the said Sarah, including that now in controversy, should be secured to the sole and separate use of the said Sarah and be subject to her disposal, notwithstanding the coverture, and that the right and title thereof should not be changed by the said marriage: while at the same time, it was understood that the said John should be permitted to use the same for the benefit of the said Sarah, but that it should in no event be subject to his debts or disposal. The bill further states, that the said John undertook to have the said agreement reduced to writing; and that the articles, drawn under his direction and intended, as she supposed, to contain fully the terms of the agreement, as above set forth, by mistake, ignorance or fraud, omitted some of the most important matters designed to be inserted therein; among others, the power to be given to her to

dispose, as she might think proper, of the estate so agreed to be secured to her separate use; that, through the influence and misrepresentations of the said John, she, being unacquainted with the forms or effect of legal instruments, was induced to sign the said articles, a copy of which is hereto appended, fully believing at the time that these articles were sufficient to carry out the original agreement as above stated. The bill further sets forth, that the marriage above referred to took place in April 1826, that the said Sarah had no issue by the said marriage and that she died in the year 18—, having first executed a paper writing, purporting to be her last will and testament, of which she appointed the plaintiff, Alston A. Jones, executor, and by which she bequeathed to the other plaintiff, William A. Whitfield, a son by a former marriage, all the personal property, settled or intended to be settled on her as aforesaid. The plaintiffs pray that they may be declared entitled to the property under the articles as they now stand and the disposition of the said Sarah, or, if they are not sufficient for that purpose, to have them reformed (136) and made to express the original agreement, and pray that the defendant may account, &c.

The defendant, in his answer, denies that there was any ignorance, fraud or mistake in the preparation of the written articles, mentioned in the plaintiff's bill, or that any influence, fraud or misrepresentation was used to procure the execution of the said written instrument by the said Sarah, but avers that the instrument contains, truly and fully, all the stipulations, agreed upon or intended to be agreed upon, in the original parol agreement.

Replication was entered to the answer and depositions taken. The cause was then set for hearing and sent to the Supreme Court.

J. H. Bryan and *Mordecai*, for the plaintiffs.
Strange, *Husted* and *W. B. Wright*, for the defendant.

STATE OF NORTH CAROLINA—Wayne County.

Know all men, that we, John B. Hurst and Sarah B. Whitfield, of the County of Wayne, have this 6th day of April 1826, made and entered into the following agreement, viz., that we, the said John B. Hurst and Sarah B. Whitfield, have consented to wed in holy wedlock, and by the laws of North Carolina in such case the right of property is changed; know ye, that we, the said John B. Hurst and Sarah B. Whitfield, have this 6th day of April, before entering into the bonds of matrimony, agreed, that all the right, title and interest of the property now belonging to the said Sarah B. Whitfield, shall not be changed or so altered as to become subject to the payment of any debt of the said John B. Hurst, which he may now owe or may hereafter contract in any way whatever, or be subject or liable to be sold by the said John B. Hurst to his use and benefit, without the consent of the said Sarah B. Whit-
(137) field. Nevertheless, the said John B. Hurst has full power and authority to and the property of the said Sarah B. Whitfield at all times in such manner as shall be most conducive to the said Sarah B. Whitfield; and that a reasonable portion of the products of the property as aforesaid shall be made use of by the said John B. Hurst for the better support of the said Sarah B. Whitfield.

Hereunto I set my hand and seal the date first written. JOHN B. HURST. [Seal.]

In presence of
Test: J. CARRAWAY.

PEARSON, J. This case turns entirely upon the construction of the marriage contract.

After reciting the contemplated marriage, and that, by the laws of this State, the property of the wife is changed and vests in the husband, the agreement on the part of the intended husband is, "that the right of property belonging to the said Sarah Whitfield shall not be changed or so altered, as to become subject to the debts of the said Hurst, or be subject or liable to be sold

by the said Hurst, to his own use and benefit, without the consent of the said Sarah. Nevertheless the said Hurst shall have full power and authority to the property of the said Sarah in such manner as shall be most conducive to the said Sarah, and a reasonable portion of the products of the property shall be made use of by the said Hurst for the better support of the said Sarah."

There is no power conferred on the wife to dispose of the property by will. On the contrary, the sole object is to disable the husband, by providing that the property should not be so altered as to enable him to sell it without her consent, or to subject it to his debts. There is no intimation of a purpose to enable the wife, or to give her a separate estate, or power to dispose of it by will.

(138) The plaintiff, seemingly aware of this infirmity in the instrument, makes an allegation, that it was the intention to confer this power upon the wife, and if the articles do not confer it, it is averred to have been through the ignorance or mistake of the draftsman. There is no proof of this allegation. On the contrary, the proofs show the intention to have been in conformity to the construction, which we have put on the instrument. There is, therefore, no ground upon which to correct it, and it gives Mrs. Hurst no power to dispose of the property by will.

PER CURIAM. Bill dismissed with costs.

ROBERT WALTON vs. SIDNEY WALTON & AL.

Where an advancement of a slave has been made to a son by a father, who died intestate, and the slave dies in the life time of the father, the son shall be charged with the valuation of this negro, as a part of his advancement, in the distribution of the intestate's estate. If slaves advanced increase, the child has the benefit; if a loss happens, it falls on the child.

The case of *Meadows* v. *Meadows*, 33 N. C., 148, cited and approved.

Cause removed from the Court of Equity of Caswell County, at the Fall Term, 1850.

The bill sets forth in substance, that Loftin Walton died in the year 1846, intestate, leaving a widow, Nancy, and the plaintiff, the defendant, Sidney, and the defendant, James, his only children, and that they are the only persons entitled to distribution of the said estate
(139) —that administration on the estate of the said intestate has been granted to the defendant, Sidney—and that the said Nancy is since dead, having made her last will and testament, and thereof appointed the defendants, Sidney and James executors. The bill contains the usual prayer for an account and that the plaintiff may be paid what shall be found due to him.

The defendants, in their answer, admit the facts stated in the plaintiff's bill and submit to an account. They aver, however, that sundry advancements were made by their father, the intestate, to the plaintiff and particularly in slaves, and pray that these may be charged to the plaintiff in making up the account.

It was referred to the Clerk and Master to state the accounts. In doing so, the Clerk and Master charged the plaintiff with the value of a slave advanced, which had died in the father's lifetime, and reported accordingly. To this charge the plaintiff excepted, and the cause was then by consent transmitted to the Supreme Court.

Kerr, for the plaintiff.
Norwood and *E. G. Reade*, for the defendants.

PEARSON, J. The defendants have separately filed two exceptions, but they are in substance the same, and may be disposed of together. The first raises this question; a father puts several negroes into the possession of a child, and dies intestate, without having taken back the negroes. One of the negroes died in the life time of the father. The Master has charged the child with the valuation of all of the negroes at the date of the advancement. We think it was right to do so, and this exception is overruled. If the negroes increase, the child has the benefit; if a loss happens, it falls on the child. This principle is settled. Meadows v. Meadows, 33 N. C., 148.

2d. The Master does not charge the plaintiff (140) with the value of two of the negroes, who had been put into his possession, and who died in the life time of the intestate, because he says, he was of opinion from the testimony, that, after the death of the two negroes, the plaintiff delivered the two, who survived, to his father, who re-delivered them to the plaintiff; and so he concludes, that the plaintiff was chargeable only with the value of the two from the date of the re-delivery. The second exception is, that the plaintiff ought to have been charged with the value of all, at the time they first went into the plaintiff's possession. This exception, we think, is well founded, and it is allowed. The testimony does not establish the fact, that the plaintiff actually did deliver the negroes back to his father, and that he subsequently re-delivered to the plaintiff the two, who survived.

The witness, Smith, says, the intestate told him, he wished to make a new division of his negroes, and, for that purpose, had requested the defendants to surrender those, which had been put into their possession. They refused to do so, and he was much displeased. That the plaintiff "was willing and had offered to surrender the negroes, which he had received, or had actually surrendered, he does not remember which." "With some difficulty I persuaded him to drop the matter, and he finally acquiesced in my advice."

The witness, Jordan, says, the intestate told him, he

wished to make a "re-division of his negroes; that the plaintiff was willing to surrender his, but the defendants refused to surrender theirs." He says he mentioned this to the defendant, James Walton, and told him "his father said, Robert was willing to surrender or had surrendered his, to which he replied, the reason why Robert is willing to do so, is, because some of his negroes are dead and he will gain by having them thrown back and a new division made."

He also says, "he heard the defendant, Sidney (141) Walton, admit just now, that one of the negroes (put in the plaintiff's possession) was sent to his father's during his life time and died, having been sent there to be nursed, Robert having no wife."

This is the substance of all of the testimony. It falls very far short of supporting the conclusion of the Master. The burthen of proof was upon the plaintiff, and the testimony not only fails to establish the allegations of an actual surrender and re-delivery, but the inference is, that, inasmuch as the proposed new division could not be made, by reason of the refusal of the defendants, a surrender on the part of the plaintiff was unnecessary, and, therefore was not made. The fact that one of the negroes was sent to the intestate's house for the purpose of being nursed, and died there, does not support the allegation of a surrender.

This exception is allowed, and there must be a reference to reform the report.

PER CURIAM. Ordered accordingly.

(142)

ROBERT HANNER & AL. vs. WALTER WINBURN & AL.

Where the father put into the possession of his son a slave, not as an advancement but expressly as a loan, and the slave remained several years in the possession of the son, without any claim on the part of the father, and then the slave died, and afterwards the father died intestate; *Held*, that the slave was not an advancement, but the value of the hire of the slave, while in the son's possession, was an advancement.

A father sold to one of his sons a tract of land and took his bonds for the purchase money. Afterwards he surendered one of the bonds to his son, and then died intestate; *Held*, that the amount of the bond so surrendered was an advancement to the son.

In the case of advancements, interest should not be calculated on them from the time of the intestate's death; as the administrator is not chargeable with interest on the assets, until two years after that period.

The case of *Cowan* v. *Tucker*, 27 N. C., 78, cited and approved.

Cause transmitted, by consent, from the Court of Equity of Guilford County, at the Fall Term, 1848, to the Supreme Court.

This was a bill, in substance praying an account of the personal estate of Nathan Armfield, deceased, of which the plaintiffs claim two-thirds, as the assignee of two of the next of kin of the said Nathan, who were each entitled to one-third, against the defendant, Walter, who was the administrator de bonis non of the said Nathan, and the defendants, Moses Swain, and Betsey, his wife, who were entitled to the remaining distributive share. Answers were filed and depositions were taken. From these it appeared that the father, Nathan Armfield, had put in possession of one of his sons,

(143) John, the assignor of one of the plaintiffs, a negro slave, not as an advancement but as a loan—that the said slave was very valuable and remained several years with John, without any claim on the part of the father for hire, and that he died in John's possession in the liife time of the father. The Clerk, to whom it was referred to state the administration account, charged John, as an advancement, either to the value of the slave himself or his hire, while in John's possession, and submitted to the Court for which amount he should be charged. To this charge, in either aspect, the

assignee of the said John Armfield excepted. It further appeared that the said Nathan had sold a tract of land to William Hanner, the husband of one of the said Nathan's daughters, and now a distributee, for the price of which he has taken his bonds, and that afterwards he had surrendered one of these bonds, amounting to five hundred dollars, to the said William Hanner, and the Clerk in his report charged the said William's share with the said sum of five hundred dollars as an advancement. To this charge an exception was also filed. The Clerk also in his report calculated interest on the value of the several advancements from the time of the intestate's death. To this there was an exception.

Morehead, for the plaintiffs.
Miller, for the defendants.

Pearson, J. The case is before us upon exceptions to the Master's report.

The first exception is, that the commissioner charges John Armfield with the price of the boy Walker, at $1,000 as an advancement, &c., and the evidence does not support the charge. The intestate reserved the title and declared, if he should survive his son John, the boy was his, and the boy died before the intestate, and before John Armfield.

The Commissioner's report, as to Walker, is, (144) "that the advances are as follows: To John Armfield, negro Walker, or, if not, then his hires for ten or twelve years, either of which is valued at $1,000." In other words, the Commissioner refers to the Court to say, as a matter of law, whether Walker was an advancement or not, and if the Court should be of opinion that he was not, "then that his hires were, and that they were worth $1,000." We are of opinion, Walker was not an advancement. The proofs show, that he was lent to John Armfield and not given. Upon one occasion when the latter was offered, in Alabama, a very high price for the negro, he wrote to his father, the intestate, to know if he might sell him, and whether he would take that price; the intestate replied, he must

not sell him, he would not take any price. This, we think, is conclusive upon the question of an advancement. Cowan v. Tucker, 27 N. C., 78. But we are of opinion, that the hires of Walker, while in the possession of the son, were an advancement, for which his estate must account. The proofs show, that John Armfield was engaged in negro trading, and when about to start for the Southern market, Walker was put into his possession by his father to assist him in his business; and though he continued in possession of him ten or twelve years, no claim was made upon him for his hires by the intestate. Why was this? Because the intestate was willing that John should have them—in effect, he gave them to him, and John's estate was increased by them, to their full amount. If he had not had Walker, he would have been obliged to hire either another negro, or a white man, to have performed the service rendered by him, whereby his estate would have been so far reduced. Baron Comyn, in his Digest, 1st Vol., title, administration, let. H., page 486, speaking of advancements, says, "So the heir at law, if he be advanced out of the personal estate, shall account, though (145) his advancement be only the use of furniture for his life; for it is an advancement pro tanto." For this position he cites Fitzgibbon, § 285. The hires of Walker were an advancement. As to the estimate put by the Commissioner upon the hires, we have no proof that it was too high. John Armfield had his services for ten or twelve years, and it is proved that he was a very valuable slave. This exception is sustained, so far as relates to the advancement of Walker, and the report confirmed as to the hires. The second exception is sustained, so far as interest has been calculated by the Commissioner, on the advancements of John Armfield and Polly Hanner, from the death of the intestate. An executor and administrator, from the time he administers, has two years to collect in the assets and settle the estate: no interest during that time is to be paid by him. This exception is sustained and the Commissioner will correct his report in this particular, in conformity with this opinion, upon any of the advancements. The

third exception is overruled. It is proved by the testimony of Mr. Gorrell and Shannon Wiley, that William Hanner, the husband of Mrs. Polly Hanner, had purchased from Nathan Armfield, the intestate, a tract of land at the price of $1,500, which was secured by two bonds executed by the said Hanner, one for $1,000 and the other for $500. The latter witness states, that, in conversation with Nathan Armfield, the latter states that Hanner had a hard bargain in the land, and he intended to give him up the latter bond, and the former witness, that it was surrendered up by the intestate to Hanner in his presence. The intestate Armfield, then, held a bond upon William Hanner for $500, which he surrendered up to him, that is, gave him. This was a gift by Armfield to his son-in-law of $500, and is an advancement, and is so returned by Mrs. Hanner, in her list as administratrix.

PER CURIAM. Decree accordingly.

Approved. Sanders *v.* Winburn, 43 N. C., 246.

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(146)

JOHN W. RASBERRY vs. OWEN W. JONES & AL.

The Court does not favor the "splitting up of suits," unless there are several persons having distinct rights, and prejudice may result from the fact of the investigation being made too complicated. And where the plaintiff's rights stand upon the same footing, and the matters charged constitute in fact but one transaction, he may unite them all in one bill.

Where a person files a bill to set aside an usurious contract, he must submit to have the whole agreement annulled and to be restored to the original condition. Therefore he cannot claim to be relieved from the usury, and at the same time to be benefitted by the extension of credit, for which the usurious interest was stipulated.

Appeal from an interlocutory order dissolving the injunction in this case, made at the Spring Term, 1849, of Greene Court of Equity, his Honor, Judge Battle presiding.

This was a bill, filed in 1848, by the plaintiff, John

W. Rasberry, against the defendants, Owen W. Jones and William A. Brant, and set forth in substance: That the plaintiff, sometime in the year 1847, was indebted to the defendant, Owen H. Jones, in several promissory notes, amounting, with interest, on the 7th of December in that year, to $280.27 cents; that being very much embarrassed and unable to meet the payment of these debts at that time, the said defendant threatened to sue out execution, and represented to the plaintiff, that, in that case, his property would be greatly sacrificed; that the said defendant then proposed to the plaintiff to give him an extension of credit until the 7th day of
(147) December, 1848, provided the plaintiff would give him four several notes, each within a justice's jurisdiction, for the amount of the said debts, adding twenty-five per cent. by way of interest, and would immediately confess judgments thereon; that the plaintiff consented thereto, and gave his notes, bearing date the 7th of December, 1847, three for $100 each, and a fourth for $50.35, being the amount of $280.27, justly due by the plaintiff, and $70.80, the usurious interest at 25 per cent added thereto, and judgments were immediately entered on the same against the plaintiff. And the bill further sets forth, that the said defendant, Owen, then urged the plaintiff to increase his loan, and said he knew a friend, who had $100 to spare, and would loan it for twelve months for a justice's judgment, provided another judgment for $25 should be given, by way of interest, and that the plaintiff, laboring under much pecuniary embarrassment, consented that the said defendant, Owen, should make the arrangement; that the said defendant, Owen, artfully intending to entrap the plaintiff, placed money in the hands of the other defendant, William A. Brant, and, using his name, drew notes from the plaintiff payable to the said William, one for $100, and another for $25, which the plaintiff signed, and judgments were forthwith rendered on the same; it being expressly agreed, as in the other case, that no execution should issue, until after the 10th of December, 1848; and that, thereupon, the said defendant, William, paid the plaintiff one hundred

dollars. The bill charges, that the said defendant, William, is nominally only the plaintiff in these latter judgments, that the money paid was the money of the other defendant, Owen, and that the use of the name of the defendant, William, was an artful trick of the defendant, Owen, who is, in point of fact, the true owner. The bill further sets forth, that, contrary to the express agreement between the plaintiff and the defend-
(148) ants, executions have been sued out on the said judgments against the plaintiff, and the defendants threaten forthwith to collect the same. The plaintiff then avers that he is willing to waive the penalty, and to pay the amount justly due with interest from the 7th of December, 1848, and prays for an injunction, and to be relieved from the payment of the usurious interest, and for further relief, &c.

To this bill the defendants demurred generally, and the demurrer being sustained in part and overruled in part, the defendants, by leave, appealed to this Court.

W. Winslow and *Washington*, for the plaintiff.
Biggs and *Rodman*, for the defendants.

Pearson, J. The demurrer cannot be sustained upon the ground taken by the defendants' counsel in this Court, viz: Multifariousness. The bill is not defective in this particular. It alleges that the defendant, Jones, is the beneficial owner of all the judgments, and that the other defendant, Brant, was a mere naked holder of the legal title in one of the judgments for the ease of the other defendant, the legal title being separated from the use, merely as a trick or cover. The same usury is alleged to affect all of the judgments, and in fact the whole was but one transaction.

This Court does not favor the "splitting up of suits," unless there are several persons having distinct rights, and prejudice may result from the fact of the investigation being made too complicated; but in this case it is a manifest saving of time and money, to try both causes of action together, and thereby avoid travelling twice over the same ground.

But the bill is defective in a particular, which was not noticed on the argument. The bill submits to pay, the "amount justly due, with lawful interest thereon, after the said 7th of December, 1848." Now the bill alleges that the transaction took place on the 7th of De-
(149) cember, 1847, and the defendant, Jones, was to forbear, until the 7th of December, 1848, for the usurious interest of 25 per cent, which was at the time secured by notes, and judgments, and as the plaintiff seeks to repudiate the agreement, so far as the 25 per cent is concerned, he must also give up the year's credit, and ought to have submitted to pay lawful interest from the 7th of December, 1847, when the money was lent and the forbearance promised.

This was, no doubt, a mere inadvertence in drawing the bill and we looked into the decretal order, to see, if the defect was not corrected, but there, instead of amounts and dates particularly stated, we find a loose general reference, to the admissions of the bill, and, instead of an order overruling the demurrer, and dissolving the injunction as to the principal money, with interest from the 7th of December, 1847, "The Court overrules all the causes assigned for demurrer, except that relating to the extent of the injunction." This latter ground was no cause of demurrer, but was a matter for consideration upon the motion to dissolve.

The decretal order must be reversed, and this opinion certified to the Court below, that the proper orders may be entered; we think neither party entitled to costs.

PER CURIAM. Ordered to be certified accordingly.

(150)

WILLIAM R. BROTHERS vs. BURWELL BROTHERS.

It is an inflexible rule, that, when a trustee buys at his own sale, even if he gives a fair price, the *cestui que trust* has his election to treat that sale as a nullity, not because there is, but because there may be, fraud.

Cause removed from the Court of Equity of Gates County, at the Fall Term, 1850.

In this case, the following facts appeared from the pleading and proof:

The plaintiff, about the year 1842, for the purpose of securing his creditors, by deed conveyed to the defendant some real estate, and some negroes and other personal property in trust, that, if the plaintiff should fail to pay the debts recited in the deed, when the same should be demanded, he, the defendant, should sell the said property at public sale for cash, after advertising the same for six months, &c., for the space of, &c., and, out of the proceeds of such sale, pay off the aforesaid debt, and the residue, if any, pay over to the plaintiff. The defendant, in the year 1843, after giving the required notice, as trustee, exposed the said property to sale at public sale, and at his request one John H. Hinton bid off the property for his (the defendant's) own use and benefit, and took a conveyance therefor from the defendant, as trustee, but afterwards reconveyed it to him in his own right. The property remained in the possession of the defendant, who claimed it as his own, from that time up to the filing of the bill, with

(151) the exception of one negro woman, who died, and the real estate which was sold by the defendant for the same price, at which it was bid off at the public sale. This bill was filed in January, 1851, and the plaintiff, after setting forth these facts, prayed that the said sale be set aside and a new sale ordered and an account taken, &c.

The cause was set for hearing upon the bill, answer and proofs and transmitted by consent to this Court.

A. Moore, for the plaintiff.
Heath, for the defendant.

Pearson, J. The plaintiff has by his proofs made good his allegation, that the defendant bought the property at the sale, made by him as trustee, by the instrumentality of Hinton, who bid off the property as his agent.

Nothing has been done amounting to an affirmation of the sale, and the plaintiff applies within a reasonable time to have it set aside, and the property sold over again. He has a right to do so. It is an inflexible rule, that when a trustee buys at his own sale, even if he gives a fair price, the cestui que trust has his election to treat that sale as a nullity, not because there is, but because there may be, fraud. It must be declared to be the opinion of this Court, that the plaintiff is entitled to have the said personal property resold, and that he is also entitled to have the land resold, unless the subsequent sale by the defendant was bona fide and for a fair price.

There must be a reference to enquire, whether the land was sold by the defendant, and if so, for what price, and the value of the land at the date of the sale, and it is also referred to the Clerk and Master of Gates County to take an account of the debts secured by the deed of trust, and the rents and hires of the land and negroes, that have been, or might, without his default, have been, received by the defendant: and the cause is reserved for further directions. By consent of the (152) parties, W. J. Baker, Clerk and Master of the Court of Equity of Gates County, is appointed Commissioner, to sell the negroes at public sale, on a credit of six months, taking bonds and approved security, and the defendant must surrender the same to the said Baker on demand.

PER CURIAM. Ordered accordingly.

Approved. Patton *v.* Thompson, 55 N. C., 285; Froneberger *v.* Lewis, 79 N. C., 426; Stradley *v* King, 84 N. C., 635; Dawkins *v.* Patterson, 87 N. C., 384; Bruner *v.* Threadgill, 88 N. C., 361: Gibson *v.* Barbour, 100 N. C., 192; Cole *v.* Stokes, 113 N. C., 272.

SAMUEL R. POTTER vs. STERLING B. EVERITT & AL.

Before the assignment of dower, a widow is not seized of any portion of the real estate of her husband, and cannot, therefore, convey any title at law to it. She can, however, make such a contract concerning it, as equity can and will, under certain circumstances, enforce.

Mere inadequacy of price is no ground for setting aside a contract, unless it be such as amounts to apparent fraud, or the situation of the parties be so unequal, as to give one of them an opportunity of making his own terms. In such a case, equity would not lend its aid to execute the contract, but leave the party seeking it to his remedy at law.

Where a deed is attacked on the ground of fraud, it is competent to show, in addition to the consideration expressed, the motives of the grantor in making the deed: such, for instance, as the relationship of the parties or the great degree of affection in the grantor for the grantee.

The cases of *Hoyle* v. *Moore*, 39 N. C., 175, and *Archibald* v. *Means*, 40 N. C., 230, cited and approved.

Cause transmitted from the Court of Equity of New Hanover County, at the Spring Term, 1850.

The bill, which was filed in June, 1847, in the Court of Equity of New Hanover County, states, in substance:

That Samuel Potter departed this life sometime (153) in the month of May, 1847; that the said Samuel Potter died, intestate, and seized and possessed in fee of a large amount of real estate, lying in the State of North Carolina, and of which a particular description is set forth in the said bill; that the said Samuel Potter left surviving him his widow, Elizabeth E. Potter, one of the defendants; and that he left, as his only heirs-at-law, the plaintiff, and the defendants, Amelia, who intermarried with the defendant, Sterling B. Everitt, Amy, who intermarried with the defendant, Nicholas N. Tally, Eliza, who intermarried with the defendant, John P. Browne, and John A. Baker, an infant, the only child of Mary Baker, who died in the lifetime of her father, the said Samuel Potter. The bill further sets forth that the said Elizabeth E. Potter, by deed, bearing date the 31st day of May, 1847, for a valuable consideration conveyed to the plaintiff all and singular her right, title and interest and estate in and to the

dower or thirds of the lands of her said deceased husband, Samuel Potter, to which she was entitled as his widow; and it was prayed that an account might be taken of the profits of the said dower estate since the death of the intestate, and that the dower might be laid off and allotted to the plaintiff. The deed of conveyance from Elizabeth E. Potter to the plaintiff, referred to in the bill, was dated the 31st of May, 1847, and "for and in consideration of the sum of one thousand dollars to me in hand paid by Samuel R. Potter, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and for the further consideration of a deed of covenant from the said Samuel R. Potter, bearing even date with these presents, by which said deed the said Samuel R. Potter covenants and agrees to pay unto me, the sum of six hundred dollars every year, during my natural life, in equal quarterly instalments, as by reference to the said deed of covenant will more fully and at large appear (the said

(154) Elizabeth) hath given, granted, bargained, sold, aliened, conveyed and confirmed, and by these presents do give, grant, alien, convey and confirm unto the said Samuel R. Potter, his heirs, executors, &c., all and singular, my right, title, interest and estate, both at law and in equity, which I, the said Elizabeth, have in and to the estate, both real and personal, of my late husband, Samuel Potter, deceased, the said interest, consisting of valuable real estate in, &c.; that is to say, my right of dower or thirds in and to the said real estate, and my distributive share or one-sixth part of all the personal estate of and belonging to the estate of my said husband, Samuel Potter, consisting of about eighty slaves, &c. Also all my right, title, interest and estate, both at law and in equity, which I have both to the real and personal estate of my said deceased husband, as his widow and one of his distributees, wherever the same may be or of whatever kind or nature, to have and to hold," &c.

Judgment pro confesso was taken against all the defendants, except the infant and Elizabeth E. Potter. The former put in a formal answer, and the latter, ad-

mitting that she executed a deed, the purport of which she does not remember, avers that her execution of the same was procured by fraud, imposition, surprise and misrepresentation on the part of the plaintiff. Replication was entered to this answer, and, depositions being taken, the cause was set for hearing and transferred to the Supreme Court.

D. Reid and *Iredell*, for the plaintiff.
W. H. Haywood, for the defendants.

NASH, J. The bill in this case was, perhaps, framed upon the supposition, that the plaintiff, by his contract with the defendant, Mrs. Potter, had acquired the legal estate in the dower lands, to which she was entitled as the widow of her late husband. This is not so. Before the assignment of her dower, a widow is not (155) seized of any portion of the real estate of her husband, and cannot, therefore, convey any title at law to it. Perkins, sec. 599. She can, however, make such a contract concerning it, as equity can and will, under proper circumstances, enforce. The bill substantially is, to compel the heirs to allot the dower; and then that the widow shall convey the land so allotted. In this view of the case, Mrs. Potter is a necessary party; and though no specific relief is asked in the bill against her, it is embraced in the general prayer for relief, as it is consistent with the facts stated, and process is prayed against her. Before the prayer for process, the names of the heirs-at-law of Samuel Potter are set forth, and the defendant, Mrs. Potter, is mentioned, as the widow of the deceased Samuel Potter, from whom the plaintiff had purchased the dower land—process is prayed against all the defendants, and she, with others, has come in and answered. The bill certainly is not drawn with that attention to the proceeding of a Court of Equity, which is desirable, but we think sufficiently so to enable the Court to sustain it. It differs widely from the case of Hoyle and Moore, 39 N. C., 175, and Archibald and Means, 40 N. C., 230. In the first the prayer is, that the Clerk be ordered to issue "subpœnas

to the proper defendants;" and in the second, "no persons are named" in the stating part of the bill, as the heirs or next of kin of the intestate.

The defendant, Mrs. Potter, in her answer, admits the execution of the contract set forth in the bill, but alleges it was obtained from her by the fraudulent misrepresentations of the plaintiff; and that advantage was taken of her situation and her distress of mind, consequent upon the recent death of her husband, Samuel Potter; and that she executed it through terror of personal violence from the plaintiff, in the absence of all of her own family, who lived in the State of Pennsylvania.

It is sufficient to state, that the defendant has en-
(156) tirely failed to sustain by evidence any one of her allegations. On the contrary, the evidence taken abundantly proves, that there is no foundation, upon which to rest her charges; and that, on the contrary, she acted voluntary, with a full knowledge of her rights and of what she was doing. By the contract between the parties, the plaintiff was to give to the defendant, Mrs. Potter, for her dower right in the real estate of her late husband and for her interest in the personal property, one thousand dollars in cash, an annuity of six hundred dollars, and her board as long as she chose to stay in his house or family. He further bound himself to pay to Mrs. Babcock, of Philadelphia, a daughter of the defendant, an annuity of $150, to commence upon the death of Mrs. Potter, and besides she was to have her years' allowance, for which she subsequently received $1,000. The answer of the latter states, that her interest in the personal estate was worth ten thousand dollars, and her right of dower one thousand dollars a year. Dr. Everitt, who married a daughter of Samuel Potter, the intestate, in his deposition states, that the personal property was worth fifty or sixty thousand dollars, and that the deceased owed ten thousand dollars; and that the annual value of the real estate, after paying expenses, would not exceed fourteen hundred dollars. According to this evidence, the price paid by the plaintiff was a very inadequate one. But mere under-value is no ground for setting aside a contract, un-

less it be such as amounts to apparent fraud, or the situation of the parties be so unequal as to give one of them an opportunity of making his own terms. In such case equity would not lend its aid to execute the contract, but leave the party seeking it to his remedy at law. Lowther v. Lowther, 13 Ves. 103. If the parties were of full age and treated upon equal terms, as to their knowledge of the facts, without imposition, although an inequality of advantage, and even a gross one, be obtained, equity will not in general set (157) aside the contract. To this point the case of Gregor et al. v. Duncan et al., 2 Desaussure's Reports, is full authority. See also Hovenden on Frauds, 15. Dr. Everitt proves that the defendant had full knowledge of the value of the property, both real and personal, and placed too high an estimate upon it. If, then, this were a case of mere bargain and sale, there is nothing made to appear by the evidence which would authorize the Court to refuse its aid to the plaintiff. But from the evidence it was not one of mere bargain and sale, but of bargain and sale and donation. Mere inadequacy of price, then, can be no evidence whatever of fraud. Mrs. Potter, the wife of the plaintiff, was the granddaughter of the defendant, Mrs. Potter. Miss Bishop states, that on Monday morning, after the burial of Samuel Potter, she went to the house of the plaintiff and remained there three weeks; and that the defendant, Mrs Potter, informed her she intended to make over her right and title to the estate of her husband to Mrs. Potter, the wife of the plaintiff, and her heirs; that it was nothing more than right that the property should go in that way, as it came by Mr. Potter, and as she had made over her property before she married him and brought him nothing. This conversation took place between 9 and 10 o'clock in the morning. This witness further states, that some three or four weeks after the first conversation, the defendant told her, she had conveyed all her interest in her husband's estate to Mr. Potter; that he was to pay her two thousand dollars in cash and six hundred a year during her life, furnish her with her board and a servant, and she said her mind

was greatly relieved, and she was perfectly satisfied. It is very certain, that the consideration, upon which a deed is made, is an important part of the contract, and where it is distinctly declared, parol evidence is not more admissible to vary it than any other term contained in it; and that the rule is applicable as well (158) to proceedings in equity as at law. But the evidence is here used, not for the purpose of altering or varying the deed, but to explain why it was that the defendant was willing to take from the plaintiff a less sum than her interest was worth, to-wit: that he was married to her granddaughter. As remarked by one of the plaintiff's counsel, on a question of fraud raised by her, her reason for making such a contract is to be heard. The authorities cited by the defendant's counsel certainly sustain this proposition, but we do not think they sustain his position. It has been before stated, that inadequacy of price is not a distinct principle of relief in equity; but that it depends upon the attendant circumstances, which show fraud. 1 Story's Eq. s. 249. And these attendant circumstances must rest in parol. We are of opinion, therefore, that the plaintiff was at liberty to show, what was the reason which influenced the defendant in making the bargain, to repel the charge of fraud.

No answers have been filed by any of the defendants but Mrs. Potter and the infant, John Baker, who answers by his guardian and submits to such decree as the Court may make; and the bill is taken pro confesso against all the other defendants. The plaintiff is entitled to a decree for the allotment of the dower land, and thereafter to an assignment thereof from the defendant, Mrs. Potter.

PER CURIAM. Decree accordingly.

Approved. Tillery *v.* Wrenn, 86 N. C., 217; Berry *v.* Hall, 105 N. C., 154; Hartly *v.* Estis, 62 N. C., 167; Orrender *v.* Chaffin, 109 N. C., 425; Parton *v.* Allison, 109 N. C., 675; Osborne *v.* Wilkes, 108 N. C., 671; Parton *v.* Allison, 111 N. C., 430.

(159)

JOHN B. HEADEN vs. WILLIAM HEADEN & AL.

A. died, intestate, in 1848, leaving a widow and six children surviving him, to-wit: John, Susan, Rachel, Temperance, Elizabeth and Dolly. Three other children died in his life time, Sarah, Mary and Rebecca, each of whom left children, surviving the intestate. The intestate in his life time gave and conveyed to John two slaves, and a tract of land in fee. The slaves were of less value than one-tenth part of his personal estate; but they and the land together exceeded one ninth of the whole estate, real and personal. The intestate also by deed conveyed certain slaves to his daughters. He also put other slaves, without conveying them, in possession of his three daughters, who afterwards died in his life time, and after their death conveyed them to his daughters' children respectively. There is a surplus of money and slaves remaining for distribution.

Held, first: that the grandchildren, taking in right of their mothers, were not bound to bring into hotchpot the slaves put in possession of, but not conveyed to, their mothers, but conveyed to themselves, but they were bound to bring in those conveyed to their mothers respectively. The statute of distributions is restricted to gifts from a parent to a child, and does not include donations to grand-children.

Held, secondly: that under the act of 1844, ch. 51, in the distribution of the personal estate of an intestate among his children or those who represent them, advancements, made to one of the children, of real as well as of personal property, are to be brought by such child into hotchpot, even where the intestate has not died seized of any real estate: and that in this case, John, having received in real and personal property more in value than his share of the personal estate remaining for distribution, is entitled to claim no more.

Held, thirdly: that though the widow is entitled to the benefit of advancements of personalty, made to the children: yet she is not entitled to any benefit from advancements of real property, but, in estimating her distributive share, advancements of personalty are alone to be reckoned.

Held, therefore, that, in this case, the widow's share is to be first ascertained, upon the basis of a division of the personalty, by
(160) itself (including partial advancements), between her and all the children, under the act of 1784; and, after taking out her share, the remaining fund is to be divisible among the other eight children, or such of them as were not fully advanced, and their representatives.

Cause removed from the Court of Equity of Chatham County, at the Fall Term, 1850.

Upon the pleadings the case is this: Aaron Headen died intestate in 1848, leaving a widow and six children surviving him, namely, John, Susan, Rachel, Temperance, Elizabeth and Dolly. He had three other children

who died in his life time, namely, Sarah, Mary and Rebecca. Sarah married one Brooks, and had five children, viz.: Elizabeth, Sarah, Jane, Thomas, and Susan. Mary also married and had one daughter, Elizabeth Fooshee; and Rebecca married one Adams, and had three children, viz.: Agnes, James, and John; and all those grandchildren survived their grandfather.

The intestate in his life time gave and conveyed to his son, John, two slaves, and also a tract of land in fee. The slaves were of less value than one-tenth of his personal estate; but they and the land together considerably exceeded one-ninth part of his whole estate, real and personal. He also made sundry gifts of slaves by deeds to some of his other children, as follows: To Susan, two; to Rachel, six; to Temperance, four; to Elizabeth, three; to Dolly, three; to Sarah Brooks, one; and to Rebecca Adams, two. He put into the possession of his daughter, Mary, a female slave, who had two children, and upon the death of Mary, her only child, Elizabeth Fooshee, took them. The intestate afterwards made an oral gift of another slave to Elizabeth Fooshee, and in the life time of the intestate she sold that slave for $700; and the intestate likewise conveyed to her by deed of gift the woman and two children, which had been in the possession of her mother,
(161) Mary. Besides the slave conveyed to his daughter, Sarah Brooks, the intestate put into her possession another female slave, who had issue four children in the life time of said Sarah; and after her death the intestate by deeds of gift conveyed one of those slaves to each of her said five children for life, with remainder to his other children.

John, the son, administered on the intestate's estate; and, after discharging the debts and charges, he has a surplus in money and a considerable number of slaves for distribution. He filed this bill against the widow, the surviving children, and also the grandchildren, praying that the rights of the parties may be declared in several particulars mentioned, and the plaintiff made safe in the distribution of the personal estate under the direction of the Court.

W. H. Haywood, for the plaintiff.
No counsel for the defendants.

RUFFIN, C. J. One of the points stated is, whether the slaves, which were conveyed to the respective grandchildren, and had been in the possession of their mothers, are to be brought into hotchpot as advancements, either to the grandchildren or the mothers. They are not. The grandchildren are not entitled to a distributive share in their own rights, but as representing the respective mothers. They are therefore bound to bring in the gifts to their parents, but not those to themselves. There was no effectual gift of the slaves to the mothers, according to the Act of 1806; but they were conveyed directly to the several grandchildren. The statute of distributions is restricted to gifts from a parent to a child, and does not include donations to grandchildren.

Other points are, as to the share of the widow; and what is the effect of the advancements to John, as between him and his sisters, and those represent-
(162) ing them, and as between them and the widow.

It is settled, that under the words, "child's part," in the act of 1784, advancements to children are to be brought in for the benefit of the widow as well as that of other children. Davis v. Duke, 1 N. C., 361. Consequently, she is entitled here to the benefit of those made to the children themselves, consisting of personalty. The effect of the advancement in realty to the son depends on the act of 1844, C. 51. This may be considered, first, as between him and the other children. The Court is of opinion, that he is excluded from participating with them in the personalty, inasmuch as the gifts of the two kinds of estate to him exceed in value one-ninth part of the whole estate—that is, a share thereof reckoned according to the number of children. It is true, the act does not providefor the case of advancement, to the same child of both kinds of property; for it was not necessary to do so in order to give effect to the purpose of the Legislature; which was to establish a perfect equality in the division of the intestate's

whole estate, real and personal, amongst his children, excepting only, that no property given by a parent to a child is in any case to be taken away. In order to carry out that purpose, the first section enacts, that an excessive advancement of personalty shall be charged to the share of the real estate of the child advanced. It is plain, that it ought to be thus charged, whether the share of the real estate, to which the child may be entitled, be a full share, or one diminished by reason of a partial advancement in land. The next section makes a similar provision, when the excessive advancement is in real estate. Whatever the proportion of such share may be, which belongs to the child in one kind of property, an excessive provision in the other kind is, in respect of the excess, to be a deduction from it. And it was not necessary to make an express provision for the case of an advancement in each kind, because the (163) Statute of Descents and that of Distributions, (which the act of 1844 amends), had already provided for the case of a partial advancement of their kind, and the act of 1844 does not alter them, as far as it is consistent with them. In this case the excessive advancement was in land, as it must be understood, since it is stated, that the two negroes given to the son were not equal in value to a share of the personalty, but that they and the land, together, were of a greater value than a child's share of both the real and personal estates. The case of an excessive advancement in land falls under the second section of the act. That provides, that "when any person shall die intestate, seized and possessed of any real estate, who had settled any real estate on a child of more value than is equal to the share which shall descend to the other children," such child shall, in the distribution of the personal estate, be charged with the excess in value of the settled lands. It does not appear that the intestate owned any land at the time of his death, and it cannot be assumed that he did. Whence it may be argued, that the case is not within the act, which speaks of an intestate, who dies "seized and possessed of real estate." But that cannot be the true sense of this section, though it be literally

thus expressed. The second section was intended to be merely correlative to the first: the one, providing for an excess of advancement in personalty, and the other in realty. There is no expression in the first section to tie it up to the case in which the intestate died possessed or entitled to personalty; but the langage is, "that when any person shall die intestate, who had in his or her life time advanced to any child personal property of value more than equal to the distributive share of the personal estate, such child shall, in the division of the real estate, if there be any, be charged with the excess in value." These words include any and every person advancing a child in personalty: and the only terms of restriction are, "if there be any," and they ap-
(164) ply, not to the personal estate out of which the advancement was made, but to the real estate from which the child, thus excessively advanced, is excluded. It is clear, then, that if the parent give to one child his whole personal property and leave nothing but land at his death, that child is, under the first section, excluded from the real estate, either in whole or part, according to the value of the advancement and of the real estate. Now, the second section, respecting excessive advancements in real estate, is expressed in terms precisely equivalent, reddendo singula singulis, with the exception of the words, "seized and possessed of any real estate," being applied to the intestate at his death. It seems to be palpably certain, that they were introduced inadvertently, and cannot control the construction of that part of the act. It would destroy the harmony of the two clauses, and be absurd in itself. It would be singular indeed, that a child, advanced in land above the value of share of both kinds of estates, should not be admitted to a share of the personalty, if the parent left lands for the other children; but that, if the parent left no lands, as a provision for his other children, then the advanced child should come in for an equal share of the personalty with the others; in other words, that the more destitute the other children were left, the greater share the advanced child should have. It seems impossible to impute such a purpose to the

Legislature; or that it could have been meant, that an excess of advancement in one kind of estate should be charged to the child's share in the other kind, when, under the very same circumstances, an excess of advancement in the latter would not be chargeable to the share in the former. The result is, that, notwithstanding those words, "seized and possessed of any real estate," the intention of the provision was not, that an excess in land should be charged to the child in the distribution of the personal estate, provided the
(165) parent left other real estate as well as personalty; but it was, that such excess shall be thus charged at all events whenever there is personal estate to be distributed. Consequently, the son is not entitled to any more of the personal estate.

The Court, however, is of opinion, that the son's exclusion, so far as it arises from the advancement in land, is as between him and other children, or their representatives, only; and that the land is not to brought in for the benefit of the widow. The act is in terms confined to children and their representatives; it being meant to establish an equality between them, and nothing more. In the next place, the provision for the widow out of the husband's real estate is secured in a different form; that is, as dower in one-third of that left by him or conveyed with intent to defeat her right of dower. Having made that competent provision for her in the land, the law, next, gives her a child's part of the personal estate, as a distinct fund. The act of 1844 does not purport to give her more than a child's part in any case; and the law would be untrue to its policy if it were to enlarge the widow's share of the personalty, by estimating with it an advancement in land to a child and giving her in personalty a share of the aggregate in absolute property, as against all the children. There could have been no such intention; and the widow's share of the personalty is to be ascertained, just as it would be, if the act of 1844 had not been passed. Consequently, if a child be advanced in personalty to the value of a full share thereof, the advancement and that child are both to be thrown out, and the personalty on hand divided

between the widow and the other children. But, as the advancement is personalty to the son, in this case, was of less than his share, or tenth part, of the personal estate, it is morally certain, that, but for the act of 1844, he would have brought it in, and have had his full share made up to him. As respects the widow, (166) it must be brought in for the purpose of giving her a child's part, or one-tenth of the whole personalty, including that advancement, and such others in personalty as are not full advancements of that kind of property. That is necessarily so, in order to keep the widow to her child's part; for, unless the partial advancement to the son in slaves be brought in, the widow would have a ninth part of the personalty, which was left by the husband or advanced to the other children, while there are in fact nine children, and the one excluded did not receive an aliquot part of the personalty, reckoning by the whole number of children and the widow; whereas, at most, she cannot have more than a child's part or one-tenth of the whole personal estate, including advancements in it. The widow's share is, therefore, to be first ascertained, upon the basis of a division of the personalty by itself (including partial advancements) between her and all the children, under the act of 1784; and after taking out her share, the remaining fund is divisable among the other eight children, or such of them as were not fully advanced, and their representatives.

PER CURIAM. Declared accordingly.

Approved. Daves *v.* Haywood, 54 N. C., 253; Silver *v.* Broock, 55 N. C., 137; Worth *v.* McNeill, 57 N. C., 272; Arrington *v.* Dortch, 77 N. C., 367.

(167)

POLLY KEMP vs. LITTLEBERRY EARP & AL.

Where it was complained that a deed, which appeared on its face to be for an absolute sale of land, was, in reality, intended as a mere security for the money loaned or advanced, it was *held* by the Court, that the following facts established by the proofs were entirely inconsistent with the fact of an absolute sale and showed that the conveyance could only have been intended as a mortgage; 1st. that the consideration expressed was less than one-third of the value of the land; and the grantor could then have sold it for the value: 2ndly. Under the same arrangement under which the land was conveyed, and about the same time, the grantor took a bill of sale, absolute on its face, for some perishable property, as corn, &c., and it is admitted this was only a security for the loan of money; 3dly. The grantor remained in possession of the land for nearly two years, before it was claimed by the grantee, without any charge of rent; 4thly. the sum paid on the mortgage of the perishable estate exceeded the amount due on that mortgage; 5th. The precise and peculiar fraction in the sum alledged as the value of the land and the purchase money, $31.40.

Cause removed from the Court of Equity of Johnston County, at the Fall Term, 1850.

W. H. Haywood and *Busbee*, for the plaintiff.
Miller and *Winston*, for the defendants.

PEARSON, J. The plaintiff owned about seventy-five acres of land, which adjoined the land of the defendant, Littleberry Earp, and on which she lived. She owned, besides her land, ten barrels of corn, and some fodder, household and kitchen furniture, a few farming tools, a few hogs, a cow, and some sheep. She was indebted to one Wood, in the sum of $18, and was surety
(168) for one Ligon on a note to said Wood for $54, principal and interest; and, she owed to one Richardson a debt of $31.40. These debts were reduced to judgments and her property levied on. On the 13th of November, 1845, she executed to said Littleberry Earp an absolute deed in fee simple for her land, and the consideration expressed is $31.40. On the 12th of November, 1845, she executed to said Earp an absolute bill of sale, for the ten barrels of corn, fodder, hogs, cow, sheep, farming tools, and household furniture. The consideration expressed is $18. At the same time Ligon

executed an absolute bill of sale to said Earp, for a horse, a plow, and a few other articles. The consideration expressed is $54, and thereupon the said Earp assumed the said three debts, which he afterwards paid. In the fall of 1846, the plaintiff paid to the defendant $27, and Ligon paid him the $54 and interest, and in the spring of 1847, the plaintiff tendered to the defendant the balance of the money, which he had advanced, together with the interest thereon, and desired a reconveyance of the land. The defendant refused to accept the money, and insisted that the land was his, absolutely; and afterwards commenced an action of ejectment, and the plaintiff filed this bill: in which she alleges, that to relieve her property from execution sale, she applied to Wyatt Earp, one of the defendants, to lend her the money, and to take her land, and other property as security, and, after some negotiations, the defendant, Littleberry, finally agreed to "befriend her," by lending her the money, and taking deeds on the land, and other property as security, and also taking a deed from Ligon for his property, so as to relieve her from her own debts, and that for which she was bound as his security, these three debts being all she owed: and accordingly the deeds were executed, with a full assurance on the part of the defendant, Littleberry, that upon the repayment of the money, he would let her keep her property and reconvey the land: that she re-
(169) mained in possession of the land and other property, and in 1846, by her small crop of cotton, was able to make a payment of $27, and Ligon paid off his debts, and in 1847, she procured the money to discharge the balance, when the defendant, in violation of his promise, and the assurance, that the deed was only to be a mortgage, set up an absolute claim to her land: that she is poor, and illiterate, and would have signed any paper on the assurance of Earp, in whom she had confidence, and who professed to be her friend. The prayer is to be allowed to redeem upon an account. The answers admit that the bills of sale for the personal property, although absolute on their face, were intended merely as sureties for the re-payment of the money, to-

wit: the $18 paid for the plaintiff, and the $54 paid for Ligon, and that these bills of sale were accordingly cancelled, by writing "satisfied in full," on the back of them in the fall of 1846. But it is positively denied, that the deed for the land was intended as a mortgage, or that the defendant gave any promise or assurance to that effect. On the contrary, both of the defendants swear, that the defendant, Littleberry, especially, refused to advance money for and on account of the land, as a security, although the plaintiff at first requested that he would do so, and that finally an absolute sale of the land was agreed on for the sum $31.40 (the amount of the debt to Richardson), which they aver to be a full price, and an absolute deed was accordingly executed.

The allegations of the bill is supported by the depositions of a daughter and son of the plaintiff, and the denial of the answer is supported by the deposition of the defendant, Wyatt Earp: and upon this point—the testimony in reference to declarations—there is, as near as may be, a balance, an equal weight on both sides. The deed must stand, unless it can be converted into a mortgage, by facts dehors, inconsistent the fact of an
(170) absolute sale. We think there are such facts, which "kick the beam," and bring down the scale in favor of the plaintiff:

1st. The value of the land is $100—this is fully proven. The alleged price is $31.40. It is inconsistent with an absolute sale, that the price should be less than one-third of the established value.

2nd. Two witnesses, Wood and Richardson, both swear that they, at different times, offered to give the plaintiff $100 for the land, a short time before the date of the deed to the defendant, and she refused to sell; they both swear that they have been ever since, and are still, willing to give $100 for the land. They were the only two creditors of the plaintiff, and one of them, Richardson, was at her house on the 12th of November, and witnessed the bills of sale, and then received a promise from Wyatt Earp, that he would see his debt paid, viz, $31.40, and on that occasion the plaintiff did not tell him she had concluded to sell the land. These facts

are totally inconsistent with the fact, that she had at time agreed to sell her land for $31.40, and to give a mortgage on all the other property she had in the world, to pay this and the other two debts.

3rd. Under the same arrangement, by which she was to be relieved from her debts, the plaintiff executed an absolute bill of sale for her corn, hogs, &c., and an absolute deed for her land. It is admitted that the bill of sale was intended as a mortgage. Then why is it absolute on its face? And how is it, that the defendant was willing to invest money upon the precarious security of corn, fodder, hogs, &c., and was not willing to do so upon permanent landed security? No explanation is offered. The inference is, that the plaintiff, believing that the defendant was disposed to "befriend her," was willing to sign any paper, and, to induce this confidence, the defendant was willing to advance money upon the security of corn, fodder, hogs, &c., as a
(171) "lure" or "bait," whereby to get an absolute deed for the land. But it is suggested, that the defendant frankly admits, that the bill of sale was a mortgage; true, but he gives no explanation why it was absolute on its face; and the receipt of the $27 made it necessary to admit, that one of the conveyances was intended as a mortgage. A prudent mariner throws a part of his cargo overboard in a storm!

4th. The plaintiff held possession for the balance of the year 1845, during the year 1846, and until August, 1847, without paying rent. It is not suggested that by the terms of sale, she was entitled to remain on the land rent free. This is inconsistent with the fact of an absolute sale, and can only be accounted for on the ground of a mortgage. The defendant was hardlly so kind as to pay the full price (as he says) with interest on the purchase money, and charge no rent.

5th. The $27 paid exceeded the sum for which the corn, &c., was bound, $18, how was the excess $9, to be applied? There was no positive proof of any other debt.

6th. The price was $31.40. Strange the value of the land should be that very sum. In sales we usually deal

in round numbers, $30 or $35, or split the difference, $37½, but $31.40 bears the mark of a security and is inconsistent with the sale.

It must be declared to be the opinion of the Court, that the plaintiff has a right to redeem the land, set out in the bill, and there must be a reference to take an account of the rent of the land, while in the possession of the defendant, and to ascertain the amount due. As the plaintiff sues in forma pauperis, the parties pay their own costs.

PER CURIAM. Decree accordingly.

Approved. Moore *v.* Ivey, 43 N. C., 192; Lowell *v.* Barrett, 45 N. C., 50; Harding *v.* Long, 103 N. C., 1.
Vide. Blackwell *v.* Overby, 41 N C., 38.

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(172)

ADELINE ALSTON, ADM'R, vs. ADELINE ALSTON, THE YOUNGER.

A, by his will, bequeathed all his personal property to his widow. He died, leaving surviving him, his widow and eight children, who were born before the making of the will, and one child born afterwards, for whom no provision had been made; *Held*, that the latter was entitled to one-tenth part of the personal estate, though no petition was filed by such child within the time prescribed by the Act of Assembly, the administratrix having herself filed this bill under the provisions of the Act.

Cause transmitted from the Court of Equity of Chatham County, at the Spring Term, 1850.

W. H. Haywood, for the plaintiff.
No counsel for the defendant.

NASH, J. John Jones Alston died in the year 1842, having previously made and published his last will and testament; whereby he gave to his wife the whole of his personal property of every description. He left surviving him eight children, born before the making of the will. After his death, his wife was delivered of another child, the defendant, of whom she was preg-

nant at the time the will was made. The will was duly proved; and no executor being appointed in it, administration with the will annexed was granted to the widow, Mrs. Adeline Alston. The defendant claims one-tenth part of the personal estate of her father; and the bill is filed to ascertain by a decree of the Court, whether she is so entitled, and, if so, the plaintiff submits to an account and to pay over to her or her guardian her share, as the Court may direct.

The answer of the infant, filed for her by her guardian, claims a distributive share of the personal property; and the case, being set for hearing on bill and answer, is transferred to this Court.

(173) The claim of the defendant arises under the 16th and 17th sections of the act of 1836, chapter 122. It is there enacted: "When any child, &c., shall be born after the making of his or her parent's will, and such parent shall die without having made provision for such child, &c., such child, &c., may, at any time within two years after the probate of said will, prefer a petition to the Superior Court, &c., praying a provision under this act," &c. By the 17th section, it is declared, what such child shall be entitled to, to-wit: Such portion of the personal estate of the parent as the petitioner would have been entitled to, if the parent had died intestate. Mr. Alston's will makes no provision for the defendant, but gives the whole of his personal property to his wife, and he died before she was born, without making any. The defendant then very clearly comes within the letter of the act; and there is nothing in its equity to exclude her. In the case of an intestacy, the widow of the deceased and the children share equally between them the personal property. Mr. Alston left a widow and eight children, born before the will was made and the defendant is, therefore, under the Act of 1836, entitled to one-tenth part of the personal property. No petition was filed by the defendant within the time specified in the 16th section, and the bill is filed under the 22d section of the same act to ascertain and secure her rights. It must be declared, that the defendant, Adeline Alston, is entitled to a child's part of

all his personal property—that is, one-tenth part; and there must be a reference to the Master to take an account. (A)

PER CURIAM. Decree accordingly.

NOTE A.—This cause was decided at June Term, 1850, but was accidentally omitted in the reports of that term.

NOTE.—In consequence of the indisposition of Judge Nash, very few opinions were delivered by him at this term.

GENERAL ORDER.

Students, preparing to be examined for a Superior Court License, are required hereafter to read ADAMS' DOCTRINE OF EQUITY instead of FONBLANQUE.

CASES IN EQUITY

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF NORTH CAROLINA,

AT RALEIGH.

AT JUNE TERM, 1851.

SMITH M. CLAGON vs. JAMES VEASEY.

Equity will not enjoin a tenant for life from removing the property, or compel him to give security for its forthcoming, unless good ground be shown that it is in danger of being removed beyond the jurisdiction of the Court.

Appeal from an interlocutory order of the Court of Equity of Washington County, at the Spring Term, 1851, his Honor, Judge Dick, presiding.

Heath, for the plaintiff.
E. W. Jones, for the defendant.

(174)

NASH, J. Benjamin Clagon, by will, bequeathed to his daughter, Matilda Brown, during her life, two negroes, Tom and Hasty, with remainder over in case of her dying without leaving heirs. The plaintiff is the executor of the will, and files the bill to protect the interest of those in remainder as the trust is of such a nature, as to require him to take care of their interest. The legatee, Matilda Brown, married the defendant Veasey, who took the slaves into possession; and the bill charges, "that the defendant hath offered to sell the slave Hasty and hath expressed a determination or desire to have her carried out of the limits of this State,

and hath used means and attempted to do so and to have the same done, thereby intending to convert the entire value of said slave to his own use." It charges, "that the defendant has endeavored and is still endeavoring to sell Hasty to one John Pettijohn, and hath made application to one Simmons to carry said negro woman out of the limits of the State." The bill prays that the defendant may be enjoined from removing said negroes or either of them out of the State, and from selling them or either of them with that intent: and further, that he enter into bond with sureties for their forthcoming, when his wife's life estate falls in. Upon this bill a writ of injunction was issued to the defendant, restraining him from removing or disposing of the woman Hasty, in fraud of the plaintiff's rights, and particularly, from removing or causing her to be removed from the State of North Carolina.

The answer of the defendant states, that, when he married Matilda Brown, he found her in possession of the negroes, Tom and Hasty, and believed they were her absolute property: that, in consequence of a punishment, inflicted upon Hasty by her mistress, for her insolence, she ran away: when his wife insisted he should sell her, that he accordingly applied to Joseph Rhodes to ascertain from a Mr. Simmons, if he would take her to Norfolk and sell her for him; that
(177) there the matter dropped; that he never spoke to Simmons upon the subject: that John C. Pettijohn applied to him to purchase Hasty, and offered him for her $500, which he refused at that time to take, and when he next saw Pettijohn, the latter told him he had seen the will of Benjamin Clagon, and that his title was but for life—upon which, he told him, if that was the case, he would not sell her, nor has he made any attempt to do so since; nor does he intend to do so. This occurred about a year before the bill was filed.

Upon the coming in of the answer the injunction was continued to the hearing, and the defendant appealed to the Supreme Court.

The answer is to us entirely satisfactory, that the defendant has no intention to sell either of negroes, and

that his attempts to do so were made when he honestly believed he had an absolute right to them. Equity will not enjoin a tenant for life from removing the property or compel him to give security for the forthcoming of it, unless good ground be shown, that it is in danger of being removed beyond the jurisdiction of the Court.

The defendant had cause to complain of the interlocutory order in this case, and it is reversed.

This opinion will be certified to the Court of Equity of Washington County.

PER CURIAM. Ordered accordingly.

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(178)

JAMES JONES AND OTHERS vs. ALFRED W. SIMMONS, EXECUTOR.

A residue of goods, which are given for life, with a remainder over, ought to be sold by the executor, and the interest on the amount of sales should be paid to the legatee for life, the principal being kept by the executor for the remainder men.

When the property is delivered over to the tenant for life and by him wasted or consumed, the remainder men are entitled in Equity to recover its value either from the executor of the original testator or from the executor of the tenant for life.

The case of *Smith* v. *Barham*, 17 N. C., 420, cited and approved.

Cause transmitted to the Supreme Court from the Court of Equity of Halifax County by consent, at the Fall Term, 1850.

B. F. Moore, for tne plaintiff.
Bragg and *Simmons*, for the defendant.

PEARSON, J. Martha Corlew, by her will, gave to the defendant's testatrix, subject to the payment of "debts, an estate for life in a tract of land," and "all her other property, be it of what kind or nature soever, not hereinafter disposed of, and at her death to be equally divided" between the children of Celia Jones.

The executor delivered the property, consisting of furniture, farming utensils, stock, &c., to the defendant's testatrix, by whom it was consumed, disposed of, or worn out.

The plaintiffs are the children of Celia Jones, and insist that they are entitled to recover the value of the property at the time of its delivery to the defendant's testatrix, with interest from her death.

The defendants insist, that they are only entitled to such articles as remained on hand at the death of the testatrix.

A residue, which is given for life, with a re-
(179) mainder over, ought to be sold by the executor, and the interest on the amount of sales should be paid to the legatee for life, the principal being kept by the executor for the remainder men. This is settled: Smith v. Barham, 2 Dev. Eq., 420. The subject is there fully discussed, and it is not necessary to elaborate it again.

In this case, the executor, instead of converting the property into money, and holding the principal for the plaintiffs, delivered the property to the first taker, by whom it was consumed. The plaintiffs have a clear equity against the executor for compensation on account of this breach of his duty; and he is entitled, in a settlement with the representative of the first taker, to be credited with the value of the property so consumed. For this, the case above cited is a direct authority.

The plaintiffs, here, pass by the executor and call directly upon the representative of the first taker. We see no objection to their doing so. It can make no difference, whether the plaintiffs work out their equity to have the principal of the fund through the executor, or apply for it directly to the representative of the first taker. It is the case of a stakeholder, whose duty it is to see that both parties receive the benefit, to which they are entitled, but who, in breach of his duty, allows one to receive the whole. It is a plain equity, that the latter should account for and make good to the other what has been received, over and above his share, or the proportion to which he was properly entitled.

There must be a reference to ascertain the value of the property at the time it was delivered to the defendant's testatrix, and computing interest thereon from her death.

PER CURIAM. Decree accordingly.

Approved Sanders *v.* Haughton, 43 N. C., 217; Tayloe *v.* Bond, 45 N. C., 5; Williams *v.* Cotten, 56 N. C., 395; Ritch *v.* Morris, 78 N. C., 377; Britt *v.* Smith, 86 N. C., 305.

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(180)

JAMES CAMERON vs. HENRY MASON & AL.

A vendor who has parted with his title to land, has no equitable lien on the land for the purchase money.

The case of *Womble* v. *Battle*, 38 N. C., 182, cited and approved.

Cause transmitted by consent to the Supreme Court from the Court of Equity of Cumberland County, at the Spring Term, 1851.

In 1842 the plaintiff sold to the defendant Mason a piece of land in fee for $700, payable in three annual instalments, for which the purchaser gave his three promissory notes. In a few months afterwards the plaintiff let Mason into possession and made him a deed, and the latter then agreed to give new notes with sureties for the price in some short time. In December, 1842, and March, 1843, Mason made payments to the amount of nearly $200, on the first instalment. But he never gave new notes; and in May, 1843, he sold the premises to the other defendant and conveyed them to him. In July following this bill was filed, charging the insolvency of Mason, and that McCormick was fully informed of the terms of the agreement between the plaintiff and Mason, and knew, at the time he purchased, that Mason had not paid the purchase money, nor given notes with sureties for it; and praying a declaration, that the plaintiff is entitled to a lien on the land in the hands of McCormick for the balance due to the plaintiff therefor, and for a decree in default of pay-

ment by one of the defendants, to have the money raised out of the land and for general relief.

Strange, for the plaintiff.
W. Winslow, for the defendant.

(181)

RUFFIN, C. J. It is not necessary to consider the answers, as, upon the authority of Womble v. Battle, 38 N. C., 182, the bill is insufficient upon its face, as far as it seeks to set up an equitable lien for the purchase money. This bill was filed before that decision; but in that aspect it is fully answered by it. The counsel, however, contended that there were circumstances to establish a pre-contract or collusion between the defendants, to the effect, that Mason should make the purchase for the purpose of conveying to McCormick at a less price, so that thereby McCormick might get the premises at an under value and the plaintiff defeated of a large part of the price by reason of Mason's insolvency. But, without undertaking to determine the effect of such a state of facts, if existing, the Court is obliged to say, that the supposed facts are not only not established by proof, but they are not sufficiently alleged in the bill to authorize a declaration of them, nor a decree on them.

PER CURIAM. Bill dismissed with costs.

Approved. Smith *v.* High, 85 N. C., 93; White *v.* Jones, 92 N. C., 388; Peek *v.* Culberson, 104 N. C., 425.
Vide. Simmons *v.* Spruill, 56 N. C., 9.

(182)

JOHN G. HARVEY & WIFE vs. WILLIAM R. SMITH & AL.

A testatrix devised as follows: "I give and bequeath to my brother J., the other half of my estate, in trust for the benefit, maintenance and support of my daughter A., provided she becomes a widow and has not a sufficiency for her support, during her life, and, at the time of her death (or should her situation require it) to be equally divided between the children of my daughter Ann Steptoe, then alive, or their issue, and should either of them die without issue, then their part to be equally divided between the survivors or their issue.

Held, that, there being no direction for an accumulation, the profits, accruing during the coverture of A., belong to the next of kin of the testatrix.

Cause transmitted to the Supreme Court from the Court of Equity of Halifax County, at the Spring Term, 1851.

From the pleadings, the facts, so far as they relate to this bill, appeard to be these:

Eliza Nelms, by her will, devised as follows: "Secondly, I give to my brother, James W. Cotton, the following property in trust for the benefit, and support, and maintenance of my daughter, Ann W. Steptoe, during her life; at her death to be given to her children, then alive, or their issue, and should either of them die without issue, their part to be equally divided between the survivors on their issue." (Here the property is described.) "Thirdly, I give and bequeath to my said brother, James W. Cotton, the other half of my estate, in trust for the benefit, maintenance, and support of my daughter, Adeline Harvey, provided she becomes a widow, and has not a sufficiency for her support during her life, and at the time of her death (or should her situation require it), to be equally divided between the children of my daughter, Ann Steptoe, then alive, or their issue; and should either of them die with-
(183) out issue, then their part equally divided between the survivors or their issue."

The bill which was filed by Adeline Harvey and her husband against the trustee, the executor of Eliza Nelms and Ann W. Steptoe and her children, claimed that the profits of the property devised in the third clause, ac-

cruing during the coverture of the said Adeline, were undisposed of, and should be divided by the trustee or executor, between the next of kin of the said Eliza, who were the said Adeline and the defendant, Ann W. Steptoe. The defendants, Ann and her children, insisted in their answer, that such profits would, at the death of Ann, go, in the same manner as the principal, to those of them who would be then entitled under the will to the principal.

Bragg, for the plaintiff.
B. F. Moore, for the defendant.

PEARSON, J. What disposition is made of the profits of this half of the estate, until Mrs. Harvey becomes a widow? Is the fund to be increased by accumulation? Are the children of Mrs. Steptoe, now living, to have the profits? or are the profits undisposed of—"*casus omissus?*" There is no direction for an accumulation, and nothing from which it can be implied. The children of Mrs. Steptoe, who may be living at the death of Mrs. Harvey, are then to take the principal fund; but there is nothing to show, that the children, now living, are to take the profits. We are, therefore, forced to the conclusion, that the profits are undisposed of, and, of course, belong to the next of kin of the testatrix. It must be declared to be the opinion of this Court, that the plaintiffs are entitled to one-half of the said profits, until Mrs. Harvey becomes a widow or dies.

It may be, that, if she "becomes a widow and has not a sufficiency for her support," she may be (184) entitled to call for all of the profits or the one-half of the estate. That depends upon circumstances, and is not now before us.

PER CURIAM. Decree accordingly.

CHARLES L. HINTON, EX'OR, &c., vs. ROBERT LEWIS AND AL.

A testator bequeathed as follows: "Thirdly, I desire that all the rest of my negroes may be divided into two equal parts. One half of said negroes I give and bequeath to my grandchildren," A., B. and C., "to be divided between them as follows," viz: "to be equally divided between" the said A., B. and C. "Fourthly, should either of the said" A., B. and C. "die before arriving at the age of twenty-one years, unmarried and without leaving a child or children, living at his or her death, I desire that the share of the one so dying shall go and belong to the survivor or survivors of them, and should all" the said A., B. and C. "die before arriving at the age of twenty-one years, unmarried and without leaving a child or children or the issue of such living at the death of the survivor of them. I then leave the half of the negroes, hereby bequeathed to them, to such person or persons as may be my next of kin, according to the Statute of distributions." A. attained the age of twenty and married, and then died in the lifetime of the testator, leaving no issue.

Held, that the share bequeathed to A. did not survive to B. and C, but passed and went to the next of kin of the testator.

The case of *Petway* v. *Powell*, 22 N. C., 308, cited and approved.

Cause transmitted by consent to the Supreme Court from the Court of Equity of Wake County, at the Spring Term, 1851.

The facts of this case are thus stated in the plead-
(185 ings. David Hinton departed this life in the year 1850, having first made and published his last will and testament, which was duly admitted to probate. In and by his said will he bequeaths and directs, among other things, as follows: "Thirdly, I desire that all the residue of my negroes may be divided into two equal parts, and in this division I wish my said negroes may be kept in families, as far as may be practicable. One-half of said negroes I give and bequeath to my grandchildren Jane Francis, Robert and John Lewis, to be divided between them as follows, viz: In the first place one thousand dollars worth of said negroes or more to be set apart to my granddaughter, Jane Francis Lewis, and after they shall be so set apart the remainder of said negroes to be equally divided between my said granddaughter, Jane Francis, and my said grandsons, Robert and John Lewis, it being my intention to give my said granddaughter, Jane Francis, one thousand dollars

more in negroes, or more than my said grandsons, Robert and John Lewis, as she inherits no part of her father's lands. Fourthly, should either of my said grandchildren, Jane Francis, Robert or John, die before arriving at the age of twenty-one years, unmarried and without leaving a child or children living at his or her death, I desire that the share of the one so dying shall go and belong to the survivors or survivor of them, and should all my grandchildren die, before arriving at the age of twenty-one years, unmarried and without leaving a child or children, or the issue of such, living at the death of the survivor of them, I then leave the half of the negroes hereby bequeathed to them, to such person or persons as may be my next of kin, according to the statute of distributions.

Jane Francis, the legatee named, intermarried with —— Erwin, and died in the life time of the testator, after arriving at the age of twenty-one years, without leaving any child surviving her.

(186) This bill was filed by the executor of David Hinton, praying the advice of the Court as to the proper construction of the will. And the question was, whether the legacy to Jane Francis became vested in the brothers, who survived her, or whether it was a lapsed legacy, so that the property bequeathed went to the next of kin of the said David Hinton.

H. W. Miller, for the plaintiff.
Saunders and *Rogers*, for the defendants.

PEARSON, J. According to the English authorities, if a legacy be given to A and B, they are joint tenants, and by the right of survivorship, if A dies in the life time of the testator, B takes the whole. But, if it be given to A and B, to be equally divided between them, they are tenants in common, and there is no right of survivorship; so that if A dies in the life time of the testator, his is a lapsed legacy, and B has only the one-half.

In this case, the testatrix directs a division between the legatees, Jane, Robert and John Lewis, as tenants

in common, and he adds a provision for survivorship. This survivorship, however, is not absolute and unqualified, but is to take place only in the event that one of the three dies before arriving at the age of twenty-one, unmarried and without a child living at the time of his or her death.

If Jane had survived the testator, her brothers, Robert and John, would not have been entitled to her share; because she had arrived at the age of twenty-one, which event excluded the right of survivorship, as provided for in the will. Allow to them the same right of survivorship, so as to prevent a lapse of the legacy intended for Jane, she having died in the life time of the testator, they can take nothing under that right, because it was only to have effect in the event of her dying before arriving at the age of twenty-one, which event (187) did not occur; and, therefore, the survivorship provided for in the will, did not arise, and the part intended for her is consequently undisposed of, and passes under the residuary clause—one-third to Charles L. Hinton, one-third to Robert and John Lewis, representing their mother; and the other third to the children of Mrs. Miller.

It is not necessary to advert to the fact, that Jane not only arrived at the age of twenty-one, but married; which is another circumstance to exclude survivorship; nor to the fact, that, in the division, she was to have one thousand dollars more than her brothers. This has no bearing on the question of survivorship.

Our attention was called in the argument to the case of Petway v. Powell, 22 N. C., 308. There, the legacy was given to the children of A—two would answer this general description as well as three, and the death of one in the life time of the testator would make no difference. The case has no bearing on our question. If a legacy be given to "the three children of A," or "to Jane, Robert and John Lewis, my grandchildren," the individuals are identified and "selected out," so that they take as individuals and not as a class.

It may be, that, if the testator had foreseen this result, he would have provided for it. All that we can do

is to construe the will according to the legal import of the words used.

PER CURIAM. Decree accordingly.

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(188)

JOSEPH P. TIMBERLAKE AND OTHERS vs. SAMUEL HARRIS & AL.

A testiator by his will gave and bequeathed "to the heirs of S. G. six hundred dollars." In another clause of his will he gave to A. and B., "sons of W., five hundred dollars each," and, in another clause, to the seven children of G. T. two hundred dollars each." S. G. is still living.

Held, that the bequest "to the heirs of G. T." was void for vagueness and uncertainty.

Cause removed to the Supreme Court, by consent of the parties, from the Court of Equity of Franklin County, at the Fall Term, 1850.

Drury Jones died in January, 1847, having made his last will and testament, which was duly admitted to probate. The only clauses of the will, material in this suit, were the following: 1st, I give and bequeath to Julius Sidney and Algernon Joyner, sons of William H. Joyner, five hundred dollars each, &c." "3rd, I give and bequeath to Sarah Ann Baker, daughter of Kemp, two hundred dollars. 4th, I give and bequeath to William Jones, son of Benjamin, two hundred dollars. 7th, I give and bequeath to the seven children of Julius Timberlake, deceased, two hundred dollars each. 13th, I give and bequeath to the heirs of Samuel Jones six hundred dollars."

The question submitted by the pleadings in this case, was whether the bequest to the heirs of Samuel Jones was or was not valid.

Busbee, for the plaintiff.
B. F. Moore, for the defendant.

PEARSON, J. The will of Drury Jones has this clause: "Item 13: I give and bequeath to the heirs of
(189) Samuel Jones, six hundred dollars." Samuel Jones is living, and, of course, has no heirs—"*nemo est heares viventis*;" and the question is, what did the testator mean?

He says: "Item 1: I give to Julius and Algernon Joyner, sons of William H. Joyner, five hundred dollars each;" and in "item 7, I give to the seven children of Julius Timberlake, deceased, two hundred dollars each."

The general rule is, that a will or other writing cannot be added to, varied, or explained by parol evidence, but must speak for itself. In fitting the description to the person or thing, of course parol evidence must be resorted to; as, if a deed say, "beginning at a black oak and running thence," &c., what black oak, must be determined by parol evidence. So, if a will says, "I give to my nephew, John," what individual was meant, must be determined by parol evidence; or "I give my white horse," what horse was meant, must be determined in the same way. So, if a testator says, I give to the "captain," who was meant by this soubriequet or nick-name must be ascertained by proving, that he was in the habit of calling a certain person "captain."

In our case the difficulty is not in fitting the description to the person or thing, but in ascertaining what the description means. What did he mean by the heirs of Samuel Jones? Taken literally, Samuel Jones had no heirs, because he was alive. Admitting it to be competent to prove, by way of explanation, that the testator knew that Samuel Jones was alive, can any one say, what he meant by "the heirs of Samuel Jones?" In speaking of the Timberlakes, he says, "the children of Julius Timberlake, deceased," and in speaking of Joyners, he says, "the sons of William H. Joyner." We cannot suppose, that by the words, "heirs of Samuel Jones," he meant the children of Jones; for, if so, why did he not say "children," as he had done in reference to the Timberlakes. He must have had some reason
for varying the expression. At all events, we are
(190) not at liberty to depart from the proper meaning

of the word "heirs," and give to it the same meaning as to the word "children," which the testator had just before used.

It may be, he meant by the word "heirs," to include the children and grandchildren, or the descendants of Samuel Jones. We cannot say—and are obliged to declare, that we are unable to say, what the testator meant: and the legacy is void for vagueness and uncertainty.

The will must be construed as if item 13 were stricken out. There is no other difficulty suggested.

PER CURIAM. Decree accordingly.

JOHN L. KITCHEN vs. ALEXANDER HERRING & AL.

When, in a contract for the conveyance of land, the land is described as "lying on the southwest side of Black River adjoining the lands of William Hoffard and Martial." *Held*, that the description was sufficiently certain to entitle the bargainee to a specific performance of the contract.

Though it appears that the land contracted for is chiefly valuable on account of the timber, yet Equity will decree a specific performance.

The principle of specific performance is adopted, not because the land is fertile or rich in minerals, or valuable for timber, but because it is land—a favorite and favored subject in England, and in every country of Anglo-Saxon origin.

The case of *Williams* v. *Howard*, 7 N. C., 1, cited and approved.

Cause transmitted to the Supreme Court from the Court of Equity of New Hanover County, at the Spring Term, 1850.

W. Winslow, for the plaintiff.
Strange, for the defendant.

PEARSON, J. In December, 1846, the defend- (191) ant, Herring, executed a contract in writing in these words, "Received of John L. Kitchen, payment in full for a certain tract of land lying on the

southwest side of Black River, adjoining the lands of William Hofford and Martial, for which I am to give him a good deed, &c." The defendant Prigden wrote the contract and is a subscribing witness. The plaintiff was put into possession in March, 1847. Prigden united with him; and the other defendant, Musgrove, under a contract with Prigden, with a large number of hands, commenced cutting down the timber, which constitutes the chief value of the land. Prigden was the surety of the plaintiff to a note of $325, given payable at three months for the price of the land. In January, Herring executed a deed for the land to Prigden, and under this title the plaintiff was turned out of possession.

The prayer of the bill is for a specific performance, for an account of the profits and for an injunction.

After the bill was filed, an arrangement was made, by which Musgrove continued his operations in getting timber, and agreed to account with the successful party. The defendants, Herring and Prigden, allege, that the note was to bear interest from the date, and this clause was omitted by mistake; and that there was an entire mistake in drawing the contract, for that the title was to be made to Prigden, and not to the plaintiff. They further allege, that the contract was rescinded by mutual consent. These allegations are not sustained by the proof. In regard to the interest—the plaintiff, at the time he tendered the amount of the note and demanded a deed, offered to pay interest for the three months, but there is not such an admission of his obligation to pay the interest, as will justify a departure, from the terms of the note. The offer was obviously made to avoid litigation, to buy his peace, and there is no proof of a mistake.

(192) The defendant's counsel insisted, that the contract was void because of its vagueness and uncertainty. This position is untenable. The description is sufficiently certain to identify the land—"that is certain which can be made certain," and for this purpose an enquiry would be ordered, if necessary. But the parties seem to have had no difficulty in this respect; for, it

is admitted, that the tract of land which was the subject of the contract, had been conveyed by deed to Prigden, and in that way its identity is established. The description in this contract is similar to that constantly made by the constables in levies upon land, from which sheriffs have no difficulty as to what land to sell, and how to make the deeds.

It was further insisted, that, as it appears by the plaintiff's own showing, that "the land is chiefly valuable on account of the timber," this case does not come within the principle, on which a specific performance is decreed.

The position is new, and the counsel admitted, that there was no authority to sustain it, but he contended with earnestness, that it was so fully sustained by "the reason of the thing," as to justify a departure from a well settled rule of this Court, under the maxim, *cessante ratione cessat lex.*

The argument failed wholly to prove that "the reason of the thing" called for an exception. The principle in regard to land was adopted, not because it was fertile or rich in minerals, or valuable for timber, but simply because it was land—a favorite and favored subject in England, and every country of the Anglo-Saxon origin. Our constitution gives to land pre-eminence over every other species of property; and our law, whether administered in Courts of law or of equity, gives to it the same preference. Land, whether rich or poor, cannot be taken to pay debts until the personal property is exhausted. Contracts concerning land must be in writing. Land must be sold at the court house, must be conveyed by deeds duly registered, and other instances "too tedious to mention." The principle is, (193) that land is assumed to have a peculiar value, so as to give an equity for a specific performance, without reference to its quality or quantity. The same is assumed as to slaves (Williams v. Howard, 7 N. C., 74), while in regard to other property, less favored, a specific performance will not be decreed, unless there be peculiar circumstances; for, if with the money, an

article of the same description can be bought in market—corn, cotton, &c., the remedy at law is adequate.

There must be a decree for the plaintiff with costs.

PER CURIAM. Decree accordingly.

First paragraph of head-note—*Approved.* Henly *v.* Wilson, 81 N. C., 405; Edwards *v.* Bowden, 99 N. C., 80; Blow *v.* Vaughan, 105 N. C., 198; Perry *v.* Scott, 109 N. C., 382.

Third paragraph of head-note—*Approved.* Barnes *v.* Barnes, 65 N. C., 261; Dupre *v.* Williams, 58 N. C., 96; Cheatham *v.* Crews, 83 N. C., 313; Paddock *v.* Davenport, 107 N. C., 710.

CYPRIAN CROSS & AL. vs. WILLIAM F. CAMP.

Although, in general, a tenant for life of slaves is entitled to the possession of them, yet it is a settled rule of the Court not to allow them to be removed beyond the jurisdiction of the State.

Hence when a tenant for life, of slaves, living here, threatens to carry them away or sell them to another with a view to their removal, a Court of Equity will lay him under injunction and bonds not to remove them and to have them forthcoming.

Cause transmitted to the Supreme Court from the Court of Equity of Northampton County, at the Fall Term, 1850.

Lucy C. Rives, late of Northampton, by her will gave certain real estate, and also her negroes and every other kind and description of property owned by her to her two infant daughters, Sarah Rives and Mary Rives, for their lives respectively, with the following limi-
(194) tations: That if one of them should die without leaving a child surviving her, the whole property shall vest in and go to the survivor of the two daughters: and if they or either of them should marry and have issue, then the said share of the property given to the mother shall go to such child or children as she may leave living at her death: and that if one of the daughters should die leaving a child or children and the other daughter shall afterwards die, leaving no child surviving her, then the whole property shall vest in and go to such surviving child or children of the daughter first dying,

as shall be also living at the death of the second daughter without issue as aforesaid: and if both of the daughters should die without leaving a child surviving, that then the whole property shall go to the two brothers of the testator, Lucius Turner and Cassander Turner, and her sister, Martha Turner.

The testator left several slaves and other personal estate: and the executor assented to the legacies and delivered the slaves to one Peebles, the guardian of the two daughters of the testatrix and also paid over to him the sum of $2,836, as alleged, as the proceeds of the other personal property and the profits of the estate.

During the year 1850, the daughter Sarah, who is still an infant, intermarried with William F. Camp, who is an inhabitant of Tennessee: and soon afterwards and while the negroes were hired out, Camp filed a petition in the County Court in the name of himself and his wife against her sister Mary and the guardian to have partition of the slaves and payment of one half the money, with the avowed intention of returning to his place of residence in Tennessee and carrying the slaves with him.

Lucius Turner and Cassander Turner reside out of this State, and in December, 1850, Mary Rives, by her guardian, Peebles, and Martha, the sister, and her husband, Cyprian Cross, filed this bill, praying that the rights of the persons interested in the funds may
(195) be secured, and particularly that the defendant may be restrained from removing his wife's share of the negroes out of this State and be compelled to give security not to remove them and to produce them when required by the Court from time to time, and for general relief.

The answer insists on the right of the husband to receive the money belonging to his wife, and also upon his right to remove the slaves to Tennessee, where he resides. He states, that he has no intention to sell them or any of them, or otherwise to part from them, and that his sole purpose in removing them is to have the fuller enjoyment of their profits, by employing them in his own service.

B. F. Moore, for the plaintiff.
Bragg, for the defendants.

RUFFIN, C. J. The tenant for life of a residue or of a sum of money can have the interest only; for, in effect, he is the donee of an annuity measured by the interest. The solvency of one in the best credit now is so uncertain as to any future time, especially through his lifetime, as not to authorize his having in his hands, or his own credit, money which must go over to others at his death. The executor, therefore, ought not to have paid the money part of the estate to the daughter's guardian, but ought to have required it to be invested under the direction of the Court for the benefit of all who may be entitled from time to time. As the whole fund happens in this case to be together in the hands of a person, who was the guardian of both of the daughters, it can now be brought in, so that it may be invested in State bonds or otherwise effectually secured. Of course, this is the rule in reference to the original capital only: for such part of the fund in the hands of the guardian as arose from suits, hires or interest of money, accrued since the death of the testatrix, belongs absolutely to the two daughters: being in substance what was (196) given to them. In taking the accounts, therefore, the capital and such profits must be distinguished.

It is not precisely the same with respect to slaves. They have always been delivered to the legatee for life: because the right in remainder is not defeated, nor necessarily endangered by his insolvency, as the specific thing goes over. But although the tenant for life be thus entitled to the slaves specifically, it is the settled rule of the Court not to allow them to be removed beyond the jurisdiction. It can hardly be, that remaindermen and especially remote contingent remaindermen should not have the value of their interests materially affected by carrying the slaves to remote places, when it must be highly inconvenient and expensive to follow, identify and reclaim them. It would put it in the power of the present holders to baffle those claiming

after them, and reduce the value of their property in the slaves to almost nothing. Hence, when a tenant living here has threatened to carry away slaves or to sell them to another with the view of their removal, he has always been laid under an injunction and bonds not to remove them and to have them forthcoming. There is in this case, indeed, no particular evil purpose in the defendant in the removal he intended, as we must take it from the answer, that his object is solely his own rightful enjoyment without any design to injure those entitled after him. Yet the Court must act upon general principles; and we cannot tell how far creditors of the husband in Tennessee might lay hold of those slaves, and thereby the whole of them, at some future time, be scattered into different places and hands, from which the remainder-men might find it almost impossible to regain the possession or recover the value. The case is, therefore, one in which the plaintiffs are entitled to an injunction, and also to have a receiver appointed to take the custody of the slaves and hire them out, paying the hires to the person entitled for the time being, (197) unless the defendant will enter into proper bonds not to remove the slaves from this State, and to produce them as may be required by the Court.

PER CURIAM. Decree accordingly.

ABSALOM B. DALTON vs. CHRISTIANA DALTON & AL.

When a widow has dower assigned to her in a tract of land, the reversion of which is divided among several different reversioners, she has in general a discretionary right to get wood for repairs, fire wood, &c., from what part of the land she pleases. But it seems, that, in an extreme case, where the widow acts out of mere caprice and partiality, with a view to favor one at the expense of the other, a Court of Equity might be induced to interfere.

Cause transmitted to the Supreme Court by consent, from the Court of Equity of Stokes County, at the Fall Term, 1851.

No counsel for the plaintiff.
J. T. Morehead, for the defendants.

PEARSON, J. David Dalton died seized of some valuable tracts of land. A paper, purporting to be his will, was offered for probate, but, upon an agreement between his widow and children, no evidence was offered in support of it, and it was found by the verdict of a jury not to be his will. The dower of the widow (198) was then assigned, and the land was divided among the heirs at law. The dower covered a part of the land assigned to the plaintiff and also a part of the lot assigned to Thomas H. P. Dalton. The dower includes the dwelling house and also a valuable mill, both of which were situated on the land, in which Thomas H. P. Dalton had the reversion. The mill and dwelling being out of repair, the widow, who is one of the defendants, caused timber to be cut on the plaintiff's lot for the purpose of repairing, and did not get any of the timber required for the repairs, (although a great deal was necessary), off of the land of Thomas H. P. Dalton.

The bill charges, that the land of Thomas H. P. Dalton lay as convenient for the purpose of getting the timber as the land of the plaintiff, and was equally as well timbered; and that his mother, the widow, who is one of the defendants, by the aid and assistance of the other defendant, David N. Dalton, procured all the tim-

ber necessary for the repairs to be cut off of his land, intending thereby to throw the whole burden on him, and from mere caprice and partiality to ease and favor his brother Thomas H. P. Dalton, upon whose land the mill and house were situated, and who would ultimately have the benefit of the repairs. The bill further alleges, that the defendant threatens to cut all of the timber off of his land and to make sale thereof; and the prayer is for an injunction to stay waste, and an account of the timber already cut.

The defendant, Christiana Dalton, admits, that she got all of the timber necessary for the repairs of the mill and house off of the land, in which the plaintiff owns the reversion after her dower estate; and she avows the intention to get as much timber and wood as she may see proper, off of the plaintiff's land, and sell the same, resting her claim upon her right as tenant in dower, and more particularly under the agreement entered into for the compromise in relation to the will of her husband. She says, however, that she has not
(199) as yet taken more timber and wood than were required for necessary repairs, fire wood, fencing and other plantation purposes.

The other defendant, David N. Dalton, disavows all interest in the controversy, and says, he was living with his mother and acted merely as her agent and superintendent.

There is no ground whatever for the right asserted by the defendant, Christiana, as derived under the agreement of compromise. The agreement simply provides, that the dower shall be assigned, as in case of intestacy, with the additional provision, that she shall have an estate for the term of seven years in the lands assigned, notwithstanding her death before the expiration of that time. In consequence, however, of the assertion of this right and the avowal of her intention to cut as much timber and wood as she sees proper, the plaintiff is entitled to have the injunction made perpetual against the commission of waste and the cutting of any more timber and wood than may be required for necessary

repairs, for fire wood, fencing and other purposes of the plantation.

Upon the other question, arising out of the right as tenant in dower, there is more difficulty. She certainly has a right to get timber and wood for the purposes above stated, and, except under peculiar circumstances, from what part of the land she will get it is a matter left to her discretion, unless the act amounts to waste, because of the excess in quantity, or of the timber, (as if shade trees or fruit trees are about to be destroyed.) How far this Court will interfere to control her in the exercise of a legal right, (no waste being alleged,) is a grave question. It will seldom arise, where the reversion belongs to one person, or where the lands have not been divided among the heirs; but where there has been a division and the dower happens to cover land belonging to two of the heirs, the question may frequently be presented; and it may become necessary to decide whether the widow will be left in free exercise of her legal right, and the reversioner, upon whom (200) the burden is thrown, be left to his remedy against the other for contribution, or whether the Court will, at his instance, interfere and restrain the widow. The application of the principle would certainly be attended with much practical inconvenience. Suppose, for instance, it is alleged, that the widow cultivates a field, in which one child has the reversion, so as to improve it by putting all the manure from the stock yard on it, &c., while she cultivates a field, in which another child has the reversion, so as to exhaust it, but still not amounting to waste; or suppose she gets all the fire wood and rails from the land of one, while the land of the other is equally convenient—minute questions may thus be presented very difficult to decide.

We are inclined to the opinion, that, in an extreme case, where the widow acts out of mere caprice and partiality, with a view to favor one at the expense of the other, this Court might be induced to interfere. We do not feel called on in this case to decide the question, because the bill was filed principally to stay waste, under

an apprehension, growing out of the assertion of right on the part of the defendant and the threats made by her, which are all referable to her supposed right under the agreement of compromise, and because there is no evidence, that she has in fact taken more timber and wood than she had a right to take for the purposes above stated, or that she has in fact as yet acted out of mere caprice and favoritism, except so far as she was influenced by her supposed right under the agreement. How she will be disposed to act under the right, to which she is entitled as a mere tenant in dower, is not known.

The bill must be dismissed as to the defendant, David N. Dalton, with costs. The injunction against waste must be made perpetual, and the defendant Christiana must pay the costs of the plaintiff.

PER CURIAM. Decree accordingly.

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(201)

ALEXANDER TAYLOR & AL., EX'ORS. vs. THE AMERICAN BIBLE SOCIETY & AL.

A testatrix, by her will, devised as follows: "I desire that, at my decease, after my just debts are paid, my property may be divided as follows, to the Bible Society, Education, Colonization and Home Missionary Societies, each five hundred dollars." It was admitted by the claimants of the respective legacies that the Bible and Colonization Societies were not described by their proper corporate names, though they were well known and usually called by the names used in the description—and so also the two other Societies.

Held, by the Court, that the descriptions not being correct on the face of the will, so as to designate with certainty who were the objects of her bounty, the legacies are void for uncertainty in the description of the persons who were to take.

In the same will is the following clause: "As to my slaves, if I could any way effect it, I would emancipate them. I do not wish to entail slavery upon them. G. P. has been promised if ever I sold him, to let him have a chance to buy himself. If this can be done, I desire it may, by his paying my estate one hundred dollars." *Held*, that by this clause there is no direction for the emancipation of any of them.

The cases of *Bridges* v. *Pleasants*, 39 N. C., 30, *Barnes* v. *Simmons*, 40 N. C., 392, cited and approved.

TAYLOR *v.* AMERICAN BIBLE SOCIETY.

Cause transmitted to the Supreme Court from the Court of Equity of Craven County, at the Spring Term, 1851.

J. W. Bryan, for the plaintiff.
J. H. Bryan, for the next of kin.
Iredell, for the Societies.

NASH, J. Mrs. Hollister, by her last will and testament, devises as follows: "I desire that at my decease, after my just debts are paid, my property may be divided in the following manner—to the Bible Society, Education, Colonization and Home Missionary
(202) Societies, each five hundred dollars." In a subsequent clause is the following bequest, "as to my slaves, if I could any way effect it, I would emancipate them. I do not wish to entail slavery upon them. George Physioc has been promised, if I ever sell him, to let him have a chance to buy himself; if this can be done I desire it may by his paying my estate a hundred dollars." The plaintiffs are the executors of the will, and the bill is filed to obtain from the Court an exposition of the two items above set forth, as to the parties meant in the first clause, and the effect of the last. The American Bible Society, the Trustees of the Board of Education of the Presbyterian Church in the United States of America, the American Colonization Society, the Trustees of the Board of Missions of the General Assembly of the Presbyterian Church in the United States of America, and the legatees of Mrs. Hollister are made defendants. The answer of the "American Bible Society" avers, that, by that name, the Society was incorporated by the Legislature of the State of New York in 1841, but that it is familiarly known by the name of "the Bible Society," to distinguish it from the numerous auxiliary societies, which have been formed in the several States, and different neighborhoods. They aver, that no Bible Society, other than auxiliaries of the American Bible Society, has been incorporated in North Carolina or existed in that State before the death of the testatrix; and that no other Bible Society is commonly

known under that name, but the American Bible Society. They charge, that the testatrix, by her donation to the Bible Society, meant the American Bible Society. The answer of the Trustees of the Board of Education of the Presbyterian Church in the United States of America states, that they were duly incorporated by that name in the State of Pennsylvania: but that, among the members of the Presbyterian Church, of whom the testatrix was one, it is commonly known and spoken of, as the Education Society: and that the object of the testatrix's bounty was their incorpo-
(203) rated Society. They aver, that there is no other Education Society subject to the control of the General Assembly of the Presbyterian Church of the United States of America, but the one they represent. The answer of "the Trustees of the Board of Missions of the General Assembly of the Presbyterian Church in the United States of America" set forth, that the Society is incorporated by that name, but that, among the members of the Presbyterian Church, they are known by the name of the Presbyterian Home Missionary Society and so frequently designated; and that the testatrix was a member of the Presbyterian Church, and she meant her donation for their Society. The answer of "the American Colonization Society" states, that the Society is an incorporated body under that style and title; but that it is familiarly known as and called the Colonization Society, and is rarely spoken of as "the American Colonization Society:" That no other Colonization Society is known and spoken of under that name, but the American Colonization Society; and that the latter Society was the object of the testatrix's bounty. The other answers admit, that the testatrix was a member of the Presbyterian Church, well acquainted with its various societies; but deny, that there is any emancipation of any of her slaves, and submit to such decree as the Court may make.

The cause is set for hearing on the bill, and answers:

Where a cause is to be heard in equity upon the bill and answers, the latter, when responsive to the former, are to be taken as true. The answers of the different

societies set forth their several legitimate titles, or the titles by which they are incorporated, and under which they are at liberty to sue and be sued, to receive and to hold property either real or personal. They admit, that they are not properly described in the will of Mrs. Hollister, but aver, that, in the several legacies given to the respective societies, the societies they repre-
(204) sent were meant. Let it be supposed, then, that the testatrix in her donation to the "Bible Society," meant "the American Bible Society," in her donation to "the Education Society," meant "the Trustees of the Board of Education of the Presbyterian Church in the United States of America," that in her donation to "the Colonization Society," she meant "the American Colonization Society," and in her donation to "the Home Missionary Society," she intended "the Trustees of the Board of Missions of the General Assembly of the Presbyterian Church in the United States of America." Still the difficulty remains, does enough appear on the face of the will to authorize the Court to give such effect to the legacies? If permitted to express an individual opinion, I have no doubt such was the intention of the testatrix, but at the same time, I admit, I look in vain to the will, for evidence of such fact. The principles, which must govern the case, are fully stated and discussed in the cases of Bridges v. Pleasants, 39 N. C., 30, and Barnes v. Simmons, 40 N. C., 392. The first was upon the will of Stephen Justice, wherein he devised as follows: "After my will is complied with, after the above directions, it is my will, that $1,000, if there be so much remaining, be applied to foreign missions and to the poor saints." The answer states, that the testator was a pious and zealous member of the Baptist Church, and "that by the term poor saints, the testator meant his Christian brethren, who might be in needy circumstances, and that the terms, "home missions and foreign missions," applies to the efforts of the Baptist Church to extend the knowledge of Christianity in foreign lands and in our own country. The cause was heard upon bill and answer. The Court say, it is a perfectly well known principle of law, that a Court can-

not go out of a will to construe it. The paper must tell us the testator's meaning, or we can never find it out. The Court further held, that, as the doctrine of *cy. pres.* does not have any existence in this country, the Courts can administer a fund upon no such arbitrary (205) principles. Therefore, say the Court, a bequest to a religious charity must, like others, be to some definite purpose and to some body or association of persons having a legal existence, and with capacity to take. The case of Barnes v. Simmons, was also heard upon bill and answer. The bill was filed against the defendant as executor of James Simmons, for the conveyance of two negroes, alleged to be devised to complainant, and, through a mistake of the writer of the will, otherwise disposed of. The executor admits the mistake. The Court there reiterates the principle, "that written instruments, whether deeds or wills, are to be construed upon their own terms." "That, at least there must be enough in them, in respect both to the person to take, and to the subject to pass by the instrument." If these cases be law, they are decisive of this. Upon what ground do the defendants place their claim to receive these different bequests? Simply upon the intention of the testatrix, deduced from the alleged fact, that she was a zealous member of the Presbyterian Church, and that Church had societies of the different kinds mentioned in the will. But we look in vain into the will to see any such intention or any foundation for any such intention.

In the language of the Court in Pleasant's case, we must find the intention in the paper or we can never find it. In the absence of all evidence furnished by the instrument itself, we cannot say the Bible Society means the American Bible Society, or that the Education Society means the Trustees of the Board of Education of the Presbyterian Church of the United States of America—and so of the other societies mentioned.

The case does not present the question of a latent ambiguity. That only arises where several things or persons come completely within the description contained in the will. Here, it is not pretended, that there are

two societies of either kind mentioned in the will. On the contrary, some of the answers positively deny (206) it. But the attempt is, to substitute one body of men, who by law are competent to take, for another, which is not competent. We regret the necessity, which compels us to declare, that the several legacies, set forth in the first clause of the will, are void for uncertainty in the description of the persons who are to take.

The executors pray the advice of the Court, as to the slaves of the testatrix, particularly as to George Physioc. We have no advice to give—all we can do is to give a construction to the clause, relative to the slaves of the testatrix. She nowhere leaves them their freedom, or directs the executors to emancipate them. She says, if she could, she would emancipate, but she does not do it. As to George, so far from giving him his freedom, she expressly directs a sale, and only permits him to purchase himself at a particular price.

PER CURIAM. Declared accordingly.

Overruled. D. and D. Inst. *v.* Norwood, 45 N. C., 65. *Cited* in *Dissenting opinion*, Tilley *v.* Ellis, 119 N. C., 248.

JAMES R. PHILLIPS & OTHERS vs. LOT S. HUMPHREY & AL.

A testator bequeathed and devised to each of his five children a large amount of personal and real estate "subject to the payment of one hundred dollars," each to A. B., when she should arrive at the age of eighteen. *Held*, that the duty of paying these sums of one hundred dollars to A. B. was not imposed on the executor, but was a trust to be performed by the children respectively.

When C. D. purchased some of the land and negroes so bequeathed and with notice, he is liable, in default of the legatees and devisees, to pay to A. B. the proportion of her legacy which the legatees or devisees, from whom he purchased, were bound to contribute respectively, the legacy to A. B. being a lien on such property.

Cause removed by consent from the Court of Equity of Onslow County, at the Spring Term, 1851.

(207) The facts were as follows: Lot Humphrey by his last will and testament devised and bequeathed to each of his five children a large amount of real and personal estate, and in each clause of devise and bequest were contained the following words, "subject to the performance and payment of one hundred dollars to the direction of the subsequent part of this will." In a subsequent clause of his will he directs as follows: "I will that my executors apply one hundred dollars to the schooling and support of Juliann Littleton. I now will and direct my five children as hereinbefore reserved and provided at the arrival of the said Juliann to the age of eighteen years, that the first four named children pay and deliver over unto her one hundred dollars cash as her legacy herein by me provided and willed, and that the other (naming her) at her own arrival at twenty-one years of age, pay and deliver over to said Juliann one hundred dollars as part of her legacy as before provided as aforementioned." The executors paid over to Juliann the hundred dollars directed to be paid by them for her schooling, &c., and delivered to the legatees their respective legacies.

William Humphrey, one of the defendants, purchased from some of the children parts of the property so de-

vised and bequeathed, with full knowledge of the directions contained in the will.

The prayer of the bill, which was filed by Juliann, was for a recovery from the children of her legacy; and, in case of their default, from the defendant, William Humphrey.

J. W. Bryan, for the plaintiff, submitted the following argument:

1. In the case of debts and legacies charged upon lands, it seems that no rule of construction has been adopted in the one case, which does not apply to (208) the other, and that the real estate has been charged with legacies by words not stronger than those used in relation to debts. Clowdsley v. Pelham, 1 Vern., 411; Alcock v. Spanhaw, 2 Vern., 228. The legacy to the plaintiff is a charge upon the estate given to the defendants. Smith v. Wiseman, 41 N. C., 540; Glenn v. Fisher, 6 Johns. C. R., 34, and the plaintiffs are entitled to interest thereon, from the time the legacy became payable without a demand, &c.

2. William Humphrey was both executor and purchaser of the estate given under the will of the testator; he had therefore, express notice of the charge and incumbrance upon the estate so purchased by him. He who purchases a title under a will by which a trust is created, and has notice of the will must, at his peril, take notice of the operation and construction of the law upon it. Bovey v. Smith, 1 Vern., 84, 144, reversed in Ho. of Lords, S. C., 2 Chan. Cas., 125; Moore v. Bennett, 2 Chan. Cas., 246; 2 Powell on Mortgages, 565, Thompson v. Blair, 7 N. C., 591.

By notice of a deed a purchaser will not only be deemed to have notice of its contents, but also of the performance or non-performance of the stipulations and agreements contained in that deed; for, having notice of the covenants, he should enquire whether they have been satisfied, or remain to be executed. Thus, no claim can be maintained by a husband under his marriage agreement, while the terms on his part are not fulfilled.

Mitford v. Mitford, 9 Ves., 87. And, therefore, a purchaser from him of the subject which was settled on the part of the wife, with notice of the deed, will be bound by the same equity as the husband was subject to. Harvey v. Ashley, 2 Sch. and Lef., 328, cited in Hamilton v. Royse, &c.; Howlett v. Thompson, 36 N. C., R., 369; Christmas v. Mitchell, 38 N. C., 535.

3. The voluntary conveyance of the testator to his children, admitting the same to be operative, cannot help them, or the defendant, Humphrey. They have (209) made their election to take under the will, and Humphrey is bound thereby and cannot be permitted to claim under the will without giving full effect to it, in every respect, so far as they are concerned; 2 Roper on Legacies, 378; 2 Schoale and Letroy, 266, Noys v. Mordant, 2 Vern., 581; 9 Ves., 516, 10 Ib., 609; Streatfield v. Streatfield, 1 Swan., 436, 447. No man, says, Ch. Baron Eyre, shall be allowed to disappoint a will, under which he takes a benefit. Blake v. Bunbury, Vesey, Jr., 523.

4. As against the defendants, the personal estate is not the primary fund for the payment of these legacies, for the whole estate given to these defendants is charged with these legacies, and the plaintiffs are not compelled to rely upon one fund alone for the payment of the same, or the adjustment of the different funds liable for their satisfaction. The real and personal estate is an entire fund, and the law does not separate the same. Atkins v. Kron, 37 N. C., 66, Ib., 40 N. C., 216.

PEARSON, J. It is admitted, that the sum of $100, which the testator directed his executor to pay to the plaintiff, Juliann, has been paid. This sum, therefore, is out of the case.

The defendants, Lot S. Humphrey, Penn and his wife Eldah, Jacob Doty and his wife Minerva, Samuel Doty and his wife Susan, and William Pollock and wife Olive, are respectively liable and must be decreed to pay to the plaintiffs the sum of $100 each, and the four first named are to pay interest on the said $100, from the time the plaintiff, Juliann, arrived at the age of eighteen years.

The defendants Pollock and wife must pay interest upon the said $100 from the time the said Olive arrived at the age of twenty-one years.

The next question is, as to the secondary liability, in the event that the amount cannot be made out of the parties above named.

First: It was insisted, that the defendant Wil-
(210) liam Humphrey was liable, because it was his duty not to pay over the legacies, until the said sums of $100 were paid by the legatees respectively. We do not think this duty was imposed on him by the will. The testator gave the several legacies to his children and imposed on them the trust or charge of paying to the plaintiff, Juliann, the said sum of $100 each, when she arrived at the age of eighteen years, with the exception of Olive, who was to pay the $100 charged on her legacy, when she arrived at the age of twenty-one. The only duty imposed on the executor in this behalf was to pay the $100, which, it is admitted, he has paid.

Second. It was insisted, that the defendant William Humphrey was liable, because he had purchased with notice some of the negroes and land of the legatees and devisees, charged with the trust of paying the $100. No question can be made as to his having notice. As to the $100 and interest payable by Jacob Doty and wife Minerva, he is clearly liable. He admits he has a contract for the land devised to the said Minerva; and Owen Huggins proves, that he purchased from Jacob Doty and wife two of the negroes, which they took under the will; and the $100 was a charge upon the land and negroes. As to the $100 and interest payable by Lot S. Humphrey, this is a trust and charge upon all the land, which the said Lot S. took under the will of his father, and which he conveyed to the defendant William. But in 1820, Lot Homphrey, Sr., made a deed of gift of certain land to the said Lot S. By his will in 1823, he confirms this gift, subject to the charge, and as it appears from the face of the will, devised to him certain other land acquired after the making of the deed of gift. If this land, acquired after the date of the deed of gift, 1st January, 1820, is of value sufficient to pay the $100 and

interest, the defendant William Humphrey, to whom it has been transferred, is liable for the amount; (211) and the enquiry, whether he is chargeable by reason of the land contained in the deed of gift of 1st of January, 1820, will be unnecessary.

The cause upon this point will, therefore, be reserved for further directions; and there must be an enquiry as to the value of the land devised, which is not included in the deed of 1st of January, 1820.

PER CURIAM. Decree accordingly.

Approved. Hines *v.* Hines, 95 N. C., 482.

THOMAS MOTLEY vs. ROBERT MOTLEY & AL.

An agent, who renders no account, is entitled to no compensation for his services, nor is he entitled to charge for the particular payments made for his principal, without showing that, upon a settlement of the transactions of his agency, such an amount is due to him.

When A. claimed title to a slave as a legatee, and one of the other legatees conveyed certain other slaves to A. in consideration that he would suffer the slave claimed by him to be sold as a part of the fund for distribution, and it turned out that A. was not in fact entitled to such slave, the agreement that the slave should be so sold did not form a valuable and sufficient consideration for the slaves conveyed by the other legatee.

The principle is well settled, that if an agent or trustee convert the property confided to him, the principal or *cestui qui trust* may, at his election ratify the transaction and claim whatever profit is made by it.

The cases of *Downey* v. *Bullock*, *ante*, 102; *Ward* v. *Turner*, *ante*, 73, and *Turnage* v. *Turnage*, *ante*, 127, cited and approved.

Cause transmitted by consent to the Supreme Court from the Court of Equity of Stanly County, at the Spring Term, 1851.

The facts are stated in the opinion delivered (212) in this Court.

Dargan and *Barringer*, for the plaintiff.
G. C. Mendenhall, for the defendants.

MOTLEY *v.* MOTLEY.

PEARSON, J. Thomas Motley, Sr., died in 1831, leaving a large real and personal estate. By this will, after giving to his other children (who are not parties to this suit), a considerable amount of property, he gave to his wife, during her life, the place on which he lived, nine valuable negroes, stock, wagon, &c.; at her death to be equally divided between his three sons, the plaintiff and the two defendants, who were appointed his executors. The widow died in 1842, and the defendants took possession of the negroes and sold most of them, and also such of the stock, &c., as remained on hand.

The bill is filed for an account of the negroes and their increase, and the stock, &c. An account has been taken, to which both parties have filed exceptions.

The 1st, 2d, 3d and 10th exceptions on the part of the plaintiff are withdrawn.

The 4th, 5th, 7th and 9th exceptions are allowed. They all apply to credits, which are given to the defendant, Ransom, on account of alleged advances made by him for the widow and rest upon the same ground. The plaintiffs and the defendants, soon after the death of their father, agreed, that, as the widow, who was their mother, was very old, and could not manage the property given to her for life, the defendant, Ransom, should act as her agent, and if the profits of the property were not sufficient for her comfortable support, the three would pay a rateable part of such further sums, as might be necessary for that purpose. Under this agreement, the master allowed the credits claimed by the defendant, Ransom, which are excepted to. We think the exceptions are well founded, because

(213) the defendant, Ransom, has not set forth any account showing what were the profits of the property, which he had undertaken to manage, and how such profits were disposed of. Without such an account it is impossible to tell, whether the sums paid by him were paid out of the profits of the property or out of his own money. There was a large amount of property. By one of his exceptions, he claims $100 a year for acting as agent. It was his duty to keep an account to show how it appeared, that the profits were not suffi-

cient; and he did not entitle himself to a credit, simply by showing that, at sundry times, he had paid debts contracted by his mother, or that she had, on one occasion, given him her note for $99.50, which is one of the items excepted to. The mere fact of his paying debts amounts to nothing. That he was expected to do as agent; and the important question, with whose money did he pay it? is left unanswered, and there was no ground, in an account with the plaintiff, to assume that the money was his own, simply from the fact of payment. Downey v. Bullock, *ante*, 102.

The 6th exception is also allowed. It is a credit of $9.90, for costs paid by the defendant, Ransom, as one of the executors, incurred in a suit by the executors against a debtor of the estate. The objection to this voucher is, that the present account does not involve a general settlement of the estate, but is confined to a settlement of that portion of it, in which the widow has a life estate, the parties not insisting upon a general settlement, for the reason, probably, that, after the death of the testator, the whole estate was satisfactorily disposed of, and all that remained open, at the death of the widow, when this bill was filed, was the part to be divided among the plaintiff and the defendants. But however that may be, it was improper to allow this single voucher, for, without a general settlement, it could not be ascertained, whether the estate was in arrear to the defendant, Ransom, or not. Ward v. Turner, *ante*, 73.

(214) The first exception on the part of the defendant, Ransom, is overruled. The testator gives to each of his children the property, "which he had put into their possession:" and the exception is, that the defendant ought not to have been charged with the value of a negro, named Anthony. The facts are: that the defendant was a young unmarried man living with his father; at the time of his death, was off at market accompanied by Anthony; and that he had frequently before gone such trips, taking Anthony with him, but he never treated the slave as his property nor set up any claim to him previously to his father's death. The

master very properly came to the conclusion, that this was not such a possession, as would vest the title under this clause of the will. The fact, that Anthony was one of the negroes given to the widow for life, puts the matter beyond all question. He is not charged with the hire of this negro during the life of the widow. This hire formed a part of the profits unaccounted for.

The second exception is overruled. It is, that the defendant, Ransom, ought not to be charged with the value of the slaves, Sam, Ben and Nancy, because these slaves had been conveyed by the widow to the defendant, Ransom, by a bill of sale, professing to pass the absolute estate, and after her death, the plaintiff had, in consideration that the defendant, Ransom, would agree to have the negro Anthony sold, as a part of the fund, subject to distribution, relinquished and transferred all of his interest and claim in and to the said three slaves to the defendant, Ransom; and so "it is insisted, that if these slaves did not become his absolute property by the bill of sale of the widow, yet, so far as the plaintiff is concerned, they were by his deed made the property of the defendant, Ransom, for a valuable and sufficient consideration." Upon the first exception it is decided, that Anthony did not belong to the defendant, Ransom, but formed a part of the fund subject to the distribution. So, the agreement, that
(215) he should be sold as a part of the fund, did not form "a valuable and sufficient consideration" for the transfer of the plaintiff's interest in the three slaves. This point is settled by the case of Turnage v. Turnage, *ante*, 127.

The 3d and 4th exceptions are withdrawn.

The 5th exception is overruled. It is, that the defendant, Ransom, was not allowed the sum of $700, for his services in attending to the business of the widow, his mother, from 1833 to 1840. It was proper to refuse this allowance. The defendant asked for it with a bad grace. He renders no account, and the property was so badly managed as scarcely to yield a support for his aged mother—in fact, he says it did not yield enough. His position is that of a bad agent, who makes no

profits, renders no accounts and sets up a claim for compensation for his services.

The 6th exception is also overruled. It is, that, as the boy Toney was exchanged by the defendant, Ransom, for the girl, Linda, and $100 in cash, he should be charged with the value of Toney and ought not to be charged with the $100 and interest and the increased value of Linda. The principal is well settled, that, if an agent or trustee converts property, the principal or *cestui que trust* may, at his election, ratify the transaction and claim whatever profit is made by it. This is obviously right and removes all inducements to attempt a speculation with funds not their own.

There must be a reference to E. B. Freeman, Esquire, to reform the account.

PER CURIAM. Decree accordingly.

MEMORANDUM.

Bartholomew F. Moore, Esquire, resigned his office of Attorney General on the —— day of May, 1851, and, on the 19th day of June, 1851, William Eaton, Esquire, of Warren County, was appointed by the Governor and Council to succeed him.

CASES IN EQUITY

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF NORTH CAROLINA,

AT MORGANTON.

AUGUST TERM, 1851.

HENRY W. BURTON, EX'R., &c., vs. JOHN H. WHEELER.

A. executed a mortgage to B. to secure the payment of a certain debt due from A. to B., and also transferred to B., without endorsement, four notes on a third person. B., at the same time, executed a deed, in which it was stipulated that B. should not call on A., or hold him liable, until the insolvency or inability to pay of the obligors is ascertained by legal process."

Held, that the mortgage and deed being executed at the same time, must be considered together.

Held, further, that collection by legal process referred only to a judgment and execution at law, and that the party was not bound to resort to a Court of Equity, to remove any impediments to a satisfaction of a judgment and execution at law, such as a fraudulent conveyance, or the like.

Appeal from the Court of Equity of Lincoln County, Spring Term, 1851, his Honor, Judge Battle presiding.

On the 1st of February, 1842, the defendant (218) purchased of Robert H. Burton, the testator of the plaintiff, a tract of land on the Catawba river, and six negroes, at the price of $15,325. Mr. Burton conveyed the property to the defendant, who, to secure the payment of the purchase money, transferred to Mr. Burton fifty shares of bank stock, and also two notes to R. M. Johnson and Joel Johnson, of Kentucky, for $5,000 each—one due the 20th of April, 1841; the other, the 20th of April, 1842; and, as further security at the

same time executed the mortgage of the land and negroes. The defendant did not endorse the notes, but covenanted to guaranty their payment, "in case the insolvency or inability to pay of the obligors is ascertained by legal process." And Mr. Burton, at the same time, executed a deed of defeasance, by which "he agreed not to call on the defendant, or hold him liable, until the insolvency or inability to pay of the obligors is ascertained by legal process."

The condition of the mortgage deed is, "in case the said R. H. Burton shall receive the full amount of said stock and the amount which is due upon both of said bonds, either from John H. Wheeler or the said R. M. Johnson or Joel Johnson, then these presents are void and of no effect."

The notes were duly presented and protested for nonpayment by the executors of Mr. Burton, he having died shortly after the sale. The bank stock was sold for $5,500, and a credit entered for that amount. In June, 1842, the executors and the defendant entered into an arrangement, by which the defendant was to take the notes and go to Kentucky, for the purpose of collecting them. The defendant received the notes and gave a receipt for them, as follows: "The within are true copies of two notes, which I have received of W. Hoke and H. W. Burton, executors of R. H. Burton, for the purpose of collecting the same and accounting for. Jno. H. Wheeler." In July, 1847, the defendant paid the sum of $1,750, as the amount then collected on
(219) the notes; and in December, 1847, he paid $1,800 as a further amount collected.

The plaintiff, who is the surviving executor, avers, that the amount due on the mortgage is $11,020.28½; and insists, that the defendant has collected the amount from R. M. and Joel Johnson, and failed to pay over and account for it, or has by his default and negligence made himself liable for the payment thereof, as R. M. and Joel Johnson are now totally insolvent.

The defendant avers that he took the notes to Kentucky and employed two eminent counsel to attend to the collection, under whose advice a bill was filed

against R. M. and Joel Johnson, in the Circuit Court of the United States, and a decree was obtained in January, 1845, sequestering the property of R. M. Johnson, in value $36,000, which property is now subject to the payment of the debt, which is, "thus rendered safe beyond all contingencies;" and the property of Joel Johnson, in value $100,000, is also bound for the debt. He avers, that the two sums paid over by him in 1847, are all that he received; and insists, that the plaintiff must look to the proceedings in equity and ascertain by legal process the insolvency and inability of the obligors to pay, before he can call on him, or is entitled to foreclose the mortgage.

The defendant files, as an exhibit, a letter from one of his counsel in Kentucky, dated 4th February, 1851, in which he says, "nothing remains to put the collection of your debt in vigorous process, but the return of the Messrs. Johnson from their Southern plantation. I fear I will have some delay in a regular reviver, as no one has administered upon Col. Johnson's estate," &c.

"The debt is entirely safe, beyond all contingencies, and every exertion will be made to bring it to a speedy close."

Replication was taken to the answer, and the
(220) case set down for hearing upon bill, answer, replication, and the exhibits filed.

Thompson and *Guion*, for plaintiff.
Lander, *Boyden* and *Avery*, for the defendant.

PEARSON, J. The case turns upon the construction of the mortgage, taken in connection with the deed of Mr. Burton, called a defeasance; for, although the words of the deed have a more particular reference to the guaranty of the notes, yet all of the instruments were executed at the same time, and must be construed together. We think it clear, that the mortgage was not to be enforced, until "the insolvency and inability to pay" of the two Johnsons was ascertained by legal process; and the question is, what was meant by legal process? Without some express stipulation, the guaranty or mort-

gage might have been resorted to as soon as the notes were presented, and protested for non-payment. Mr. Burton, therefore, stipulated that he would not resort to the guaranty or mortgage, until a judgment at law was taken on the notes, and *fieri facias* was issued, and returned "*nulla bona.*" This is what was meant by "legal process." It never was intended, that, after the remedy given by law proved unavailing, recourse should then be had to Equity, and all the remedies given in that Court, which, by possibility, might reach property fraudulently conveyed, or otherwise put out of the reach of the process of law, should be exhausted, before the defendant could be called on for payment. Such a construction is unreasonable, and is not justified by the language used.

If we suppose the defendant was under a misapprehension as to the proper construction of the deed, his conduct is fully explained. But, according to the construction we put on it, he is in default; and the plaintiff is entitled to have the mortgage foreclosed, unless the defendant pays the balance of the purchase money, which still remains unpaid.

When the defendant took the notes to Ken-
(221) tucky for the purpose of collecting them, if the money could have been made out of the Johnsons by legal process, his duty to the plaintiff and his own interest required him to take a judgment at law, and have the money made by a *fieri facias;* but, if this could not be done, then his duty to the plaintiff required him to take a judgment at law, issue a *fieri facias*, and have it returned, "*nulla bona,*" so as to give the plaintiff a right to proceed on the guaranty or mortgage; but his own convenience would strongly tempt him not to do it. It is for him to say how he acted. He says, by the advice of eminent counsel, he filed a bill in equity, and obtained a decree of sequestration against one of the obligors in 1845, upon which two payments have been realized, and the balance of the debt is fully secured. He does not file a copy of the proceeding in equity, but is content with filing a letter from one of his attorneys. He does not aver that a judgment has not been obtained,

and a return of "*nulla bona*" made on the *fieri facias;* and we presume, such is the case, and that a copy of the proceedings in equity would show it; because, it was necessary to proceed in that way at law, for the purpose of establishing the debt, and showing that the legal remedy was inadequate, in order to give jurisdiction to the Court of Equity. But, if it has not been done, it was the duty of the defendant (having undertaken to act as agent of the plaintiff), to have done it; and, in either case, he is in default, and is no longer entitled to insist upon the stipulation of the plaintiff's testator, as set forth in the defeasance.

There must be a reference to ascertain the amount due upon the mortgage, to the end that it may be foreclosed, unless the amount is paid by the defendant.

PER CURIAM. Decree accordingly.

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(222)

JOSEPH C. PHARR vs. JOHN RUSSELL.

Where it appeared that, upon a treaty for the sale of a tract of land, quantity entered essentially into the treaty, and the parties meant to contract for the land, as containing a certain quantity, and not as supposed to contain it or thereabouts; and it turns out that the deed, executed in pursuance of this treaty, conveys more or less than the quantity believed to exist, a Court of Equity, though there be no fraud, ought to relieve either party, upon the ground of surprise and mistake of both the parties.

Appeal from the Court of Equity of Cabarrus County, Spring Term, 1850, his Honor Judge Dick presiding.

Osborne and *Avery*, for the plaintiff.
Wilson and *Barringer*, for the defendant.

RUFFIN, C. J. In January, 1844, the plaintiff and defendant entered into a treaty for the exchange of their tracts of land, lying in Cabarrus County; that of the defendant being represented by him, and understood by the plaintiff, to contain two hundred acres, and that of the plaintiff being represented by him, and understood

by the defendant, to contain 250 acres. The bill states that each party understood that he was to convey the quantity thus represented, and that he was to convey no more: that no survey was made of the tract which the plaintiff had owned, in order to ascertain the quantity it contained because one Black had, a short time before the negotiation, made a survey and plat of it, and calculated the quantity, whereby it appeared to be ascertained, that it contained 250 acres; and that each party, believing the survey and calculation to be (223) correct, contracted upon the faith thereof, and dispensed with any further survey: That each party, in the course of the treaty, regarded the quantity in the two tracts as a material part of the contract: and that the land of the plaintiff would have been surveyed, under the agreement, in order to ascertain the quantity, if he and the defendant had not both relied on the correctness of the recent survey by Black: That upon that basis the negotiation was closed, by the agreement of the defendant to convey to the plaintiff his tract of 200 acres, and of the plaintiff, in consideration thereof, to pay to the defendant the sum of $1,100, and also, to convey to him his tract of 250 acres; and that, on the 26th of January, 1844, the parties mutually executed obligations, with conditions for the conveying of the said tracts of land. That given by the plaintiff is exhibited, and the condition is, "that he shall execute a good deed for two hundred and fifty acres of land, which he now lives on." The bill further states, that on the 1st of February, 1844, the parties respectively made conveyances; and that the deed from the plaintiff described the land by metes and bounds, according to Black's survey and plat, and as "containing two hundred and fifty acres," as therein set forth—which appears to be true by the deed, as exhibited by the defendant. The bill then states, that since the execution of the deed, it had been discovered, upon a re-survey, made with skill and accuracy, of the land conveyed by the plaintiff, and by a correct calculation, that there are two hundred and ninety-three acres contained within the boundaries of Black's survey and the plaintiff's

deed; and that, upon the discovery being made, the plaintiff applied to the defendant to pay him for the excess of forty-three acres, at an average of the value to be put on the whole tract, or to re-convey to the plaintiff that quantity of an average value; but that the defendant refused to do either. The prayer is, that the defendant may be decreed to do the one or the other, and for general relief. The answer states the
(224) facts to be, that the plaintiff proposed exchanging the plantation on which he lived for the land owned by the defendant; and the plaintiff undertook to show his tract to the defendant; and they walked over it together, plaintiff pointing out the several corners and lines, and alleging that the land thus shown contained 250 acres; and, as evidence of that fact, he exhibited to the defendant a plat of the same, made by Black for the plaintiff, a short time previous: That, after thus examining the land, the defendant concluded to bargain on the terms proposed, and without any further survey, relying upon the accuracy of the one made by Black: That bonds for title were then executed, and the deed afterwards made by the plaintiff according to the metes and bounds shown to the defendant and set forth in Black's plat. The answer denies, that the particular number of acres in the tract constituted any part of the trade; and states, that the plaintiff asserted, that the tract contained 250 acres, and the defendant was willing to take it for that number, according to the metes and bounds, and if there was any mistake as to the number of acres, he expected to be bound by it, and the plaintiff should be also; and the defendant claims all the land conveyed by the deed. The answer states, that some time after the trade was completed, the defendant had the land processioned, and the survey of the processioner made the contents 293: That he was unable to state whether that survey was accurate, or not; but believing that it might, probably, be wrong, he would not have it returned. The answer further states, that the defendant had made improvements on different parts of the land, believing that, in justice, he would not be deprived of any part of it. Under a direc-

tion of the Court, a survey was made, and the quantity reported to be 298 acres, and neither party excepted to the report. The proofs are, that upon the concluding of the contract, the parties caused a survey to be made of the land of the defendant, and it was found to
(225) contain 211 acres; and that the eleven acres was taken off as a surplus, and the defendant conveyed to the plaintiff only the quantity of 200 acres, and took the plaintiff's deed for his tract, as containing 250 acres. In March or April following, it was suggested to the defendant by a neighbor, that there was not 250 acres in the tract conveyed to him, and thereupon he said he would have the land processioned, and the lines and quantity legally ascertained, in order to have the quantity made up, if it should turn out there was a deficiency. The tract in question had been laid off by Black to the plaintiff, as a part of a larger tract descended from his father, and his mother was residing on the residue of the tract. The defendant gave notice to the plaintiff, his mother, and a brother, of his intention to procession the land, and on the day appointed, the plaintiff and his brother met the defendant on the premises, and the surveyor proceeded with the procession. While it was in progress the parties expressed different opinions as to the quantity, and in the course of the conversation it was verbally agreed between them, that, if there should prove to be a deficiency, it should be made up out of the old tract, by running a line parallel to that between the two tracts, and, if there was a surplus, it should be taken off, by running a parallel line on the other side. After the survey was completed, and the calculation of quantity ascertained, the surplus was found to be so large, that, in laying it off, as had been agreed, some of the defendant's houses would be included in it. The defendant thereupon said, the surplus should not be taken from that part of the tract, and directed the surveyor to lay it off on the opposite side of the tract. This occurred while the plaintiff was at his dinner at his mother's; and upon his return to the defendant's, for the purpose of knowing the result of the calcultion, he found the surveyor engaged, under

the defendant's direction in laying off forty-three acres for the plaintiff on the other side of the tract, and the plaintiff objected to taking it there, and insisting (226) on its being laid off adjoining the other part of his father's land, as the parties had agreed in the morning. The defendant refused, and the parties then had some dispute on the point, when the defendant stopped the surveyor, and told the plaintiff, if he got the land where he wanted it, he would get it by law; and the matter was thus ended. The defendant was required to produce the obligation given by him to the plaintiff, which he took up when he made a deed to the plaintiff; and he stated that he could not do so, because he is unable to find it, and believes that, thinking it then of no value, he destroyed it upon taking it up. He admits, however, that he wrote both obligations, and that they were verbatim alike, except that the plantiff's bond mentioned the locality of the land which his deed afterwards set forth. It is now to be taken as certain, that the tract of land conveyed by the plaintiff to the defendant contains 298 acres—being 48 acres more than either party believed at the time of the contract. The question is, what effect that is to have on the rights of the parties. It ought to have none, if they dealt for the tract as a whole, whether containing a greater or less quantity. It is admitted that the circumstances, that in the course of the treaty an enquiry or representation was made as to the quantity, or that the written articles or the conveyance had no terms qualifying the statement of the quantity, such as "supposed to contain, or "more or less," are not decisive, that the bargain was not of that character, especially when the sale was not, in terms, by the acre, and, by the agreement, there was to be no survey. For, it may properly influence the mind of one treating for the purchase of a tract of land as a whole, that it has long been reputed, or has been recently computed, on survey, to contain a particular quantity. Yet quantity is an important consideration in every sale and purchase; and it is natural that parties should contract with reference to it, and those circumstances may become material with others in or-

der to ascertain the true intention of the parties;
(227) and if quantity clearly appears to have entered essentially into the treaty, and that the parties meant to contract for the land as containing a certain quantity, and not as supposed to contain it, or thereabouts, and it turn out to be less or more, a Court of Equity, though there be no fraud, ought to relieve either party, upon the ground of surprise and a mistake of all the parties.

The Court entertains no doubt, that in this case the quantities in the tracts exchanged formed an essential ingredient of the treaty, in the view of each party. There is no direct evidence of what passed between them prior to giving their obligations, except what is said about it in the answer. But the statements in the answer on that part of the transaction, and the terms used in the bonds, raise a fair presumption of the materiality of the quantity, as in fact existing, to the closing the bargain by either party, notwithstanding the subsequent denial in the answer, that the quantity formed a part of the trade, and the defendant's declaration, that he expected to be bound, even if there were a mistake as to the quantity. The bonds do not say, that the obligor is to convey his "tract of land," containing so many acres, but that the one is to convey 200 acres of land, whereon he lived, and the other 250 acres, whereon he lived, indicating, that the conveyances were to be of the respective quantities, the vendee not being satisfied with less, nor the vendor bound to convey more. But, if that be equivocal, it not only appears in the beginning of the answer, that the plaintiff showed the land, its corners and lines, and said it contained 250 acres, but also that he exhibited the plat of a recent survey, representing it to contain that quantity, "as evidence of the fact," and that the defendant, "relying on the accuracy" thereof, concluded to bargain "without any further survey." These seem to be specific admissions, that "the facts," as to quantity, entered essentially into the negotiation, and that the defendant, at least, would have had that fact ascertained by
(228) "a further survey," if the one laid before him

had not been deemed complete "evidence of the fact." If, then, the bond be not so explicit as to the materiality of the quantity, as to authorize the Court to relieve upon the basis of correcting the subsequent deed by the articles, yet there ought to be relief on the basis of a mistake in the articles themselves, which, without opportunity for discovery, ran into the deed executed five days afterwards. If the quantity, as ascertained, or to be ascertained, was not, in the contemplation of the parties, of the essence of the contract, why were they so particular as to "the evidence" of the quantity? Or why would not the defendant, as he plainly intimates he would not, have concluded the bargain without a further survey or a stipulation for one, if he had not "relied on the accuracy" of Black's survey and calculation, as clearly ascertaining that material fact. Those parts of the answer cannot be explained, so as to rebut that inference from them; and it is wholly inconsistent with the subsequent statement, that the defendant expected the parties to abide by any mistake as to quantity. Indeed, that statement, in itself, is very extraordinary. Why should the defendant expect to be bound by a mistake, when there had been nothing said about a mistake, or anything to suggest the probability, that one existed? The truth is apparent, that each party regarded the quantity as materially affecting the value of the two tracts; and, as to one of them, it was to be ascertained by a survey, which dispensed with the necessity for another. In fact, however, the surveyor miscalculated the area, which is the only error in the case; and it seems, under the circumstances, as plain a ground for relief as there would have been, if there had been a stipulation for a survey, in order to find the quantity, and it was made, and a deed executed on the faith of it, and then a wrong reckoning of quantity discovered. In each case the equity seems as plain as that of correcting a settlement of accounts and bonds given for the balance, upon the discovery of an erroneous sum-
(229) ming up of the amount. These inferences from the language of the articles and the facts, found in the answer, are fortified beyond refutation by the

acts of the parties under the contract, as established by the proofs. The obligation of the defendant is admitted to have been similar to the plaintiff's in this respect. Consequently, it contained no stipulation for a survey, but only that the defendant was to "make a deed for 200 acres of land, which he lived on." Yet the parties acted, as if there had been a stipulation in the condition, that the defendant should convey only 200 acres, and that they should be laid off by admeasurement: for, they actually had the survey, and the defendant conveyed 200 acres, leaving out the small surplus of eleven acres, as not bargained for. Why was that done? Because, the parties were conscious, that although there was no such provision in the writings, it was a part of the bargain; and therefore, it ought to have been in the articles, and they were willing to act on it. This circumstance evinces, indeed, that the defendant intended no fraud in drawing the articles. But it as clearly evinces, that he had no skill in drawing such instruments, and that he committed gross mistakes by the omission of material stipulations, affecting alike the interest of himself and the plaintiff, as vendors. Then, the motive for having another survey of the land conveyed to him by the plaintiff, and the arrangements between them, while the survey was going on, and the quantity still uncertain, for adjusting their claims—not by way of compromise but upon the ground of right, under the contract, as a deficiency or surplus should appear, form very cogent additional proofs, that the contract was concluded on the basis of quantity. These acts reflect back on the articles and treaty, and show, if that be not the construction of the articles on their face, that there ought to have been a stipulation in the articles as to quantities, and that it was omitted by mistake. The consequence is, that the plaintiff is not con-
(230) cluded by his deed, because, in the supposed performance of the contract, that also was executed under surprise and when the mistake as to the quantity was unknown. It is one head of the jurisdiction of this Court, to relieve against mistake and surprise, and no case would seem more fit for its exercise than the pres-

ent. With respect to the particular relief, as neither party wishes to rescind the exchange, and, indeed, the defendant insists on his right to keep all the land included in his deed and the plaintiff submits to take a fair compensation in money for the excess in quantity, it need not be considered what would be proper if the parties had acted differently in those respects. As the case is situated the equity is plain that a value must be set on the whole tract of 298 acres, as of the time of the contract, and a part thereof be decreed to be paid to the plaintiff in the proportion of the surplus number of acres to the whole number, with interest thereon until paid; and it must be referred to ascertain the sum thus to be paid to the plaintiff. The defendant must pay the costs up to this time.

PER CURIAM. Decree accordingly.

Approved. Anderson *v.* Rainey, 100 N. C., 321.

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(231)

JANE WILSON, ADM'X, &c., vs. S. DOSTER AND AL.

An administrator may sell or pledge the effects, or discount a note belonging to the estate, and the party who deals with him will get a good title, provided he deal honestly; for the legal title is in the administrator, and the purposes of the estate may require the representative thus to dispose of parts of it.

But when a person gets from an administrator or other person acting in a fiduciary character, the trust fund, or a part of it, as payment of the trustee's own debt, that person cannot hold the fund from the *cestui que trust*, any more than the original trustee could; for it is a clear fraud, in violation of the obligations of the trust in one of the parties, and a concurrence in the fraud by the other, and both are equally liable.

The next of kin could recover the assets so disposed of, and the surety of the administrator, who has paid the claim of the next of kin, on account of the administration being insolvent, and having committed the *devastavit*, will be entitled to the same relief they could have had.

The cases of *Cannon* v. *Jenkins*, 36 N. C., 422; *Terrill* v. *Morris*, 21 N. C., 559; *Gray* v. *Armistead*, 41 N. C., 74; *Bunting* v. *Ricks*, 19 N. C., 130, and *Exum* v. *Bowden*, 39 N. C., 281, cited and approved.

Appeal from the Court of Equity of Union County, Spring Term, 1851, his Honor, Judge Battle presiding.

Upon the pleadings, and by the written admissions of the parties, the case is as follows: Moses Starnes died intestate in Union County, and Alexander W. Richardson, one of the defendants, administered on his estate, and in May, 1843, sold it and took bonds for the amount of sales, payable to himself, as the administrator of the intestate Starnes, on the 22d day of May, 1844. Among the bonds was one given by James McKorkle for $411.50, and, before the same fell due, Richardson endorsed it to the defendant Doster, who received the money at maturity. William Wilson and the defendant, Elias Preslaw, were the sureties of Richardson in his administration bond; and, he having wasted the estate of the intestate, and become insolvent, the (232) next of kin instituted an action on the administration bond against the obligors, and recovered therein for the *devastavit*, $741.36, besides the cost of suit; and the plaintiff has been obliged to pay the same, and, being unable to recover any part thereof from Richardson, by reason of his insolvency, she brought this suit in September, 1850. The bill charges, that Richardson was much embarrassed by debts, when he administered, and became more involved until his utter insolvency; and that among the debts he owed, was one to the defendant Doster, who became alarmed at the prospect of losing it, and pressed Richardson for payment, who was unable to make payment by his own means; and, in order to satisfy the defendant Doster, as far as he could, he agreed to let him have the bond of McKorkle, so belonging to the estate of the intestate, and payable to Richardson, as administrator; and Doster agreed to accept the same in payment and satisfaction of the debt from Richardson, and upon that agreement, Richardson endorsed the bond to Doster, and delivered it to him. The bill further states, that Starnes died, and the other parties all lived in the same neighborhood, and that Doster was well informed that Starnes was very little in debt at his death, and that Richardson had converted the assets to his own use, and was, in

fact, insolvent at the time he passed McKorkle's bond to him. The bill prays, amongst other things, that Doster may be decreed to pay to the plaintiff the sum received by him upon McKorkle's bond, with interest thereon, in part satisfaction of the sum paid by the plaintiff on the judgment recovered by the next of kin of Starnes.

The defendants Richardson and Preslaw did not answer, and the bill was taken *pro confesso* against them. The other defendant, Doster, put in an answer, which denies that Richardson owed him any debt on his own account, or that he took McKorkle's bond from him in satisfaction of any such indebtedness. The answer states that the manner in which he came by the bond was
(233) as follows: Richardson, in 1843, applied to this defendant for the loan of $200, saying that some of the next of kin of Starnes wanted some part of their distributive shares, and that the purpose of the loan was to pay them as much as he could; and he offered to deposit with him, Doster, McKorkle's bond for $411.50, as security therefor; and that he agreed to the proposition, and then advanced Richardson the sum of $200, and received McKorkle's bond; and afterwards collected the sum due on it, and paid the same to Richardson, retaining to his own use the sum of $200 only, with lawful interest thereon for the time. The answer denies that the defendant knew, or believed, that Richardson had wasted the assets of his intestate, or was in failing circumstances; and it states, that Richardson was the sheriff of the county, and was believed by this defendant to be an honest, industrious and thriving man, and that he made the advance with the intent to enable him to administer the estate the better, and for the accommodation of the next of kin, who were pressing for their distributive shares, as he then supposed. The parties took proofs, and the cause has been sent here for hearing.

Avery and *Wilson*, for the plaintiff.
Osborne and *Hutchinson*, for the defendant.

RUFFIN, C. J. The answer for the defendant Doster makes a clear case for him, if sustained as true; for, there is no doubt that an administrator may sell or pledge the assets, or discount a note belonging to the estate, and that the party who deals with him will get a good title, provided he deals honestly; for the legal title is in the administrator, and the purposes of the estate may require the representative thus to dispose of parts of it. Cannon v. Jenkins, 36 N. C., 422, Terrell v. Morris, 21 N. C., 559. The subject was fully discussed in a recent case of Gray v. Armistead, 41 N. C.; and there needs no more to be said on it now.

(234) But the Court is obliged to admit, that the answer is not supported by the evidence. On the contrary, notwithstanding the clear and explicit statement in the answer, the proofs, both direct and circumstantial, contradict it very clearly, and establish the truth to be, as charged in the bill, that Richardson was previously indebted to Doster on his own account, and was unable to pay him with effects of his own, and that Doster, in order to save his debts, took McKorkle's bond in satisfaction of it—seeing on the face of the bond; indeed, knowing, as admitted in the answer, that it was part of Starnes's assets. It is settled law, that when a person gets from an administrator, or other person, acting in a fiduciary capacity, the trust fund, or any part of it, as payment of the trustee's own debts, that person cannot hold the fund from the *cestui que trust*, any more than the original trustee could; for, it is a clear fraud, in violation of the obligations of the trust, in one of the parties, and a concurrence in the fraud by the other; and both are equally liable. Bunting v. Ricks, 19 N. C., 130, Exum v. Bowden, 39 N. C., 281. The next of kin of Starnes could, therefore, have recovered this money from the defendant Doster; and the same cases show, that the plaintiff, who, as surety for the administrator, has paid them, is entitled to a decree against him for it at once, since the defendant

Doster now admits the insolvency of Richardson, and his *devastavit*, and declines asking any enquiry on those points.

PER CURIAM. Decree for the plaintiff.

Approved. Latham *v.* Moore, 59 N. C., 167; Paxton *v.* Wood, 77 N. C., 11; Dancy *v.* Duncan, 96 N. C., 111; Hendrick *v.* Gidney, 114 N. C., 546.

(235)

JOHN A. POLK vs. JAMES ROBINSON AND AL.

An executor has the legal title and the authority in law to sell slaves, and other chattels of his testator, and, unless the purchaser knows that the sale is not made for the purposes of the estate, but *mala fide*, for the purpose of a *devastavit*, he gets a good title, as well in equity as at law.

Appeal from the Court of Equity of Mecklenburg County, June Term, 1851.

Milas J. Robinson, of Mecklenburg, married Nancy, the widow of Jno. Polk. By her first marriage she had issue, the plaintiff, John A. Polk, and a daughter, Mary B., who in after life married one Weeks and died. By her second marriage she had issue, Matilda D., Rosinda, and James B. Robinson. In July, 1825, Milas J. Robinson made his will and therein, after directing his debts to be paid out of his crops, money on hand, and debts due him, provided that, if there should still be debts unpaid, his executor might, instead of selling slaves or land, borrow money for their payment, and hire and lease the slaves and land for its payment. By a clause in the will, he gave to his wife Nancy two slaves, named Susanna and Peter, and, including those two, one-fifth part of all his slaves during her life, and, at her death, the whole to be equally divided among her children by John Polk and the testator, and the other four-fifths of the slaves he gave to his own three children, and he appointed Thomas G. Polk his executor. The testator died shortly afterwards, much indebted, and leaving about twenty slaves. The executor, in the

latter part of 1825, made sales of the crop and
(236) some perishable articles, and also hired out the slaves for the year 1826, and finding that the estate was much involved, and the administration was likely to be very troublesome, and being about to remove from Mecklenburg to Salisbury, came to an agreement with one James Orr, that the latter should conduct the administration in the name of the executor, and as his agent, and should have, therefor, the commissions that might be allowed the executor; and the executor never took any further part in the administration; but shortly afterwards removed to Salisbury, and after staying there a few years, removed again, to Mississippi. Orr hired out the slaves from year to year, but, from time to time, he also made sales of some of them, as often as four times, for the purpose of paying the testator's debts. The last of those sales was in 1830, and there remained unsold only the slaves Peter and Susanna, and three young children of the latter. In the meanwhile, the widow, Nancy, had intermarried with John Weeks, and he became the guardian of the testator's three children, who were all infants. In 1832 one of the daughters married the defendant Potts; and Orr rendered the final account of the administration to the County Court, and, by order of the Court, it was audited by two commissioners, one of whom was Benjamin Morrow, recently the guardian of young Potts, who had just come of age. They found the debts and charges of administration to be $10,424.50, and the assets, which had been converted into money, to be $9,789.74, thus leaving a balance unpaid in February, 1833, of $634.76, which Orr claimed the right to raise by the sale of Susanna and her children, then in the possession of Weeks and the defendants, and he proposed to McCulloch and Potts to make the purchase. The defendant Potts declined doing so, upon the ground of his rights in the matter, until he could consult his late guardian, Morrow; and after having done so, and been informed by Mr. Morrow, that the balance claimed by Orr was, in his opinion, justly due, and that it was a fair price for the women and children, McCulloch and

(237) Potts agreed to purchase them, provided John Weeks, the step-father of their wives, and the guardian of James B. Robinson, who was still an infant, approved of the transaction, and would join them in the purchase, on behalf of his ward. Weeks assented to the arrangement, and the purchase was made, as proposed by Orr, and the price paid to him by those three persons equally, and when James B. Robinson came of age, partition of the family of slaves was made between him and the other two defendants. At the time of the purchase, the plaintiff, John A. Polk, was residing with his mother, and just of age; and the mother lived until 1848. Soon after her death, this bill was filed against McCulloch, Potts and Robinson, and also the administrator of Mary B. Weeks, the plaintiff's sister, and alleges, that the executor assented to the legacy to the mother for life, and that thereby the legal title vested in her and those in remainder; so that upon her death, the slave Peter, and also Susanna, and her said three children, and others since born, vested in the plaintiff and the four defendants, as tenants in common in possession. The prayer is for partition. The answers deny the assent of the executor to the legacy, and set forth the facts above stated; and insist upon the good faith of the purchase from Orr, the agent of the executor, and on the validity of the title under it. The defendants admit, that the slave Peter is held in common, and ought to be sold for division.

Osborne and *Hutchinson*, for the plaintiff.
Wilson and *Avery*, for the defendants.

RUFFIN, C. J. The proofs satisfy the Court that the plaintiff is mistaken in the allegation of the executor's assent to the legacy, as respects the woman Susanna and her children. The executor seems to have had little or nothing to do with the estate, and hardly any (238) knowledge of the administration, which was conducted by Orr, as his general agent for that purpose. It is clear, that Orr never gave up his hold on the slaves until by the defendant's purchase the debts and

charges were satisfied. There is no reason to doubt the fairness of the balance claimed by him, and the fairness of the defendant's purchase. The late guardian of the defendant, Potts, settled the administration account, and advised the young man, that he had better purchase; and Mr. Weeks, who married the mother, and was, in her right, entitled to the slaves for life, if not needed for the payment of debts, readily gave up all claim, and on behalf of one of the children, for whom he was guardian, united with the two, who were of age, in making the purchase. An executor has the legal title and the authority in law to sell slaves and other chattels of his testator, and, unless a purchaser knows that the sale is not made for the purposes of the estate, but *mala fide*, for the purposes of a *devastavit*, he gets a good title as well in this Court as at law, as there has been occasion to say in Wilson v. Doster at this term. But in this case there is not only nothing to impeach the purchase by the defendants, but they have supported it by affirmative proof of the necessity for the sale, its openness and fairness, and the adequacy of the price. The plaintiff is, therefore, not entitled to relief, as to any of the slaves, except Peter; and he must pay the cost up to this time; and as to Peter, there must be the usual decree for a sale for the purpose of partition, and a declaration that the plaintiff is entitled to one-fifth of the proceeds of the sale and also of his hire and profits since the death of the tenant for life.

PER CURIAM. Decree accordingly.

Cited. Liles *v.* Rogers, 113 N. C., 202.

(239)

JOHN BAXTER vs. H. T. FARMER & AL.

One cannot be allowed to call for the title papers of another, under whom he sets up no title nor interest in himself, except that he may, possibly, at some time find it convenient to use them in an action at law, as evidence against those having them in possession, upon a collateral matter.

Bills to perpetuate testimony only lie, when the evidence relates to legal rights, which cannot be tried immediately, by reason of the impediment of a prior legal title, outstanding in the defendant or someone else.

Appeal from the Court of Equity of Henderson County, Spring Term, 1850, his Honor, Judge Caldwell presiding.

The bill states that in 1815, George Ashford, Mary Ashford and Anna Ashford were seized in fee in possession of an undivided moiety of a tract of land, containing 700 acres, and Martha McCarson was seized of the other moiety, as tenants in common; that said Mary married Henry Richards and Anna married James A. Tucker, and that on the 19th of December, 1826, the said George, Henry and Tucker made a deed of bargain and sale to Samuel McCarson purporting to convey to him the said undivided moiety in fee simple, and said Samuel entered under the same, and in October, 1828, the said Samuel and Martha McCarson, and her husband, James McCarson, made partition of the said land, and Samuel held the one-half in severalty and conveyed the same to Frederick Rutledge, and he entered and held the same in severalty; and that, by divers mesne conveyances to them respectively made by the defendants, Farmer and King, they have acquired the title of Samuel McCarson to separate parts of the said moiety, and also to the other moiety, which was allotted to James McCarson and wife in the partition; and the defendants are now in possession of the parcels of the land claimed by them severally under the title thus derived.

The bill further states, that in June, 1848, Mary (240) Richards and Anna Tucker, and their said husbands, joined in a deed of bargain and sale to the plaintiff, whereby they conveyed to him, upon certain

terms in the deed recited, the reversion of and in the said land so conveyed to said Samuel McCarson, and that the said deed was so executed as to pass and vest in the plaintiff the estate and interest of the said Mary and Anna of and in the land. The bill then states, that some of the grants and mesne conveyances, under which the said Mary, Anna and George Ashford derived title to the land, have not been registered, so that the plaintiff, should he be under the necessity of prosecuting a suit for the recovery of any part of the land, after the death of the said Henry or James A., when his right to the possession will accrue, will not be able to deduce a regular claim of title, and will be defeated of his action against the defendants or those claiming under them, unless he can show against them that the defendants claim title to the same and entered into possession thereof under the deeds and conveyances aforesaid. The bill then states, that the defendants and those under whom they claim, have in fact held the possession of the land for more than twenty-five years, claiming under the said deed from George Ashford, Richards and Tucker to Samuel McCarson, and under no other title, but that the said deed hath not been registered and the defendants withhold it from registration for the purpose of preventing the plaintiff from using the same or a copy thereof, as evidence that Samuel McCarson and the defendants claim under the same. The prayer is that the defendants be compelled to discover the deed and have the same registered, or produce the same in Court and allow the plaintiff to have it registered, so as to enable him to use it for the purpose aforesaid. The defendants put in a demurrer, assigning many causes, and, on argument, it was sustained, and the plaintiff appealed.

(241) *G. W. Baxter*, for the plaintiff.
N. W. Woodfin, for the defendants.

RUFFIN, C. J. The principle of this bill is new to us; and it seems somewhat singular, that one should be allowed to call for the title papers of another, under

which the plaintiff sets up no title nor any interest in himself, except that he may possibly at some time find it convenient to use them in an action at law as evidence against the defendants, upon a collateral matter. Whether such a bill will lie or not the Court conceives that the present bill will not, because it does not show that the plaintiff is legally entitled to the reversion, so as to enable him to maintain an action at law in which the evidence, if he had it, could be useful to him; since it does not appear that his own deed is registered, and consequently he has not the legal title. It is said that the bill ought to be sustained, as it is in the nature of one to perpetuate evidence. But such bills only lie when the evidence relates to legal rights, which cannot be tried immediately, by reason of the impediment of a prior temporary legal title outstanding in the defendant or some one else. If the right of the party be an equitable one, there is no impediment to an immediate suit in equity for relief and therefore there is no ground for a bill for discovery, merely, or for perpetuating evidence with a view to a future litigation in the Court of Equity. Upon this ground, then, without considering the others, the demurrer was properly sustained, and the decree must be affirmed, and the bill dismissed with costs in both Courts.

PER CURIAM. Bill dismissed with costs.

Cited. Harper *v.* Pinkston, 112 N. C., 298.

(242)

R. M. ALEXANDER & AL. vs. GRAY UTLEY & AL.

A purchaser, when he discovers that a fraud has been practiced on him, or that the other party has by his conduct prevented him from enjoying the fruits of his purchase, must, to entitle himself to relief in a Court of Equity, immediately give notice to the vendor that he will no longer be bound by his contract but will rescind it.

The case of *McDowell* v. *Simms*, 41 N. C., 278, cited and approved.

Appeal from the Court of Equity of Union County, Fall Term, 1851.

Guion, for tne plaintiff.
Craig and *Avery*, for the defendant.

NASH, J. The bill charged, that the plaintiff, Alexander, purchased from W. H. Woods, who professed to act as the agent of the defendants, the patent right of a machine, called a straw-cutter, for eleven counties in the State of Tennessee, and two counties in the State of Mississippi, at the price of five hundred dollars, for which he gave his bond, payable twelve months thereafter, with the other plaintiff, Neil, as his surety. This contract was made in December, 1845, at which time his bond bears date. The plaintiffs aver that the purchase was made expressly upon the condition, that the defendants should immediately forward to Alexander, in Lincoln county, where he resided, a duly and properly authenticated copy of the power of attorney
(243) to the said W. H. Woods. The bill further states, that in the Spring or Summer of 1846, the plaintiff, Alexander, received from Utley, the defendant, while in Tennessee, a letter, ratifying and confirming the sale made by Woods, but no authenticated power of attorney, nor has he ever received one from him; and that, upon getting to Tennessee, he found he could not make sales without such proof of his title, and, therefore, made none; and that he had not received one cent upon his said purchase; that, at December Term, 1848, of Orange Superior Court, the defendants obtained a

judgment against the present plaintiffs, upon their said bond, and have issued upon it an execution; and prays an injunction to restrain the collection of the money. The bill was filed the 23d of April, 1848.

The defendants admit, that W. H. Woods was not their agent to sell for them rights, under their patent, for the State of Tennessee. But, upon receiving from the plaintiff, Alexander, his letter, stating his purchase, they immediately, by letter, ratified and confirmed it. They aver, that they knew nothing about the terms of the sale, except from the statement contained in the plaintiff's bill. They further state, that in 1847, they received a letter from Alexander, dated in January of that year, stating, among other things, that he had sold rights for one county, at $75, and the half of three more, for $150; that, in consequence of the want of the power of attorney to Woods, he found he could do nothing with the patent, and proposing to give up the patent to the defendants, and the sales that he had made, and that they should give up his bond. They state further, that the plaintiffs ought, immediately upon finding they could make no sales, to have given up the contract, and notified them of the fact; and that, after using it twelve months and more, they came too late, as by their delay, they have prevented them from making sales, and thereby inflicted a serious injury upon them. But they are ready and willing to execute the contract in any way it may be decreed.

On the coming in of the answer, a motion was
(244) made by one of the defendants, to dissolve the injunction, which, upon argument, was refused, and the injunction continued to the hearing, whereupon an appeal was taken by the defendants to the Supreme Court.

The structure of this bill is a singular one. The plaintiffs ask no relief beyond that of enjoining the collection of the money due upon their bond. They admit, that the patent claimed by the defendants, is a valid one, and that the machine patented is valuable; but they ask, that the defendants shall not be permitted to collect their money, because they have not complied

with the condition upon which the sale was made. They do not ask to compel the defendants to comply with their contract, or that it may be rescinded. In other words, they ask the Court to give them the full benefit of the contract, and deny any of its fruits to the defendants. Such, we say, is the necessary construction to be placed on the bill in its present form. It would not be fair or equitable to suffer the plaintiffs to retain the contract, so far as it is beneficial to them, and, in effect, to rescind it, as far as it is beneficial to the defendants. But, again, by the contract made with Woods, the plaintiffs purchased the patent right for two counties in Mississippi. Of this part of the contract, they state in their bill, they do not complain. The purchase of these two counties was a part of the consideration of the bond, the collection of the money secured by which, they seek to enjoin perpetually. We are to presume, that this portion of the contract they are willing to retain, and, it appears, without paying anything for it. Why they are willing to retain that portion of the purchase, and not that part relative to Tennessee—they having no duly authenticated copy of the power of attorney to sell here, more than in Tennessee—we cannot perceive, nor does this bill inform us. There is another, and still more fatal, objection to the relief the plaintiffs seek. They were too long in making up their
(245) minds to the course they intended to pursue. The bill was filed in April, 1847, and not until they were sued for the money. The contract was made in December, 1845. In May or June, 1846, Alexander discovered, as he charges, that, without the authenticated copy of the power of attorney, he could not succeed in making sales successfully in Tennessee. He had before that written to the defendant, Utley, to forward him such a copy; instead of which, he at that time received the letter of the latter, admitting, in substance, that Woods had no power to sell rights in that State; and that, consequently, there was no power of attorney to authenticate; but he ratified and confirmed the contract made by him. The plaintiffs ought, then, to have notified the defendants, that they would not go on with the

bargain. In January, 1847, the letter was written by the plaintiff, Alexander, to Utley, in which he proposes to arrange their difficulties in the way therein suggested; but he does not then repudiate the contract. Twelve months elapse after the sale, before the defendants are apprised by the plaintiffs, that they have experienced any difficulty in sales, for the want of the power of attorney—during which time contracts of sale were made by the plaintiffs; and during the whole of which time, the defendants were kept out of the use of their patent in that region of country; and, conseqently, sustained an injury to that extent. In the case of Parsons v. Conolly, reported in a note to the 3d volume of Vesey, jr., 625, the Chancellor, commenting on the doctrine of puffing at sales by auction, observes, the doctrine "goes no further in point of authority, than where the purchaser declares off immediately"—that is, as soon as he discovers the fraud. This principle is affirmed in the case of McDowell and McKesson v. Sims and others, decided by this Court at August Term, 1849, 41 N. C., 278. This course the plaintiffs did not pursue; and they must bear the consequences.

There was error in the interlocutory order, continuing the injunction to the hearing. The decree is re-
(246) versed, and the injunction dissolved. This opinion will be certified to the Court of Equity for Union County.

The plaintiffs must pay the costs of this Court.

PER CURIAM. Ordered accordingly.

Approved. Knight *v.* Houghtalling, 85 N. C., 17; Caldwell *v.* Stirewalt, 100 N. C., 201.

Vide. Tomlinson *v.* Savage, 41 N. C., 430.

JOSIAH ELLIOTT vs. DAVID A. MAXWELL.

Where a party executes a deed, knowing it to be absolute, it must be held to be absolute, unless strong and clear proof can by adduced of mistake or imposition.

To turn an absolute deed into a mortgage on the ground of inadequacy of price, the price must be grossly inadequate.

The cases of *Lewis* v. *Owen*, 36 N. C., 290; *King* v. *Kincey*, 36 N. C., 187, and *McLaurin* v. *Wright*, 37 N. C., 94, cited and approved.

Appeal from the Court of Equity of Iredell County, Spring Term, 1851, his Honor Judge Battle presiding.

The bill states, that the plaintiff, being indebted to the defendant in a small sum of money, to-wit, twenty-two dollars and fifty cents, gave him his note for the amount. That some short time thereafter, the defendant called on the plaintiff and requested him to secure the payment of the debt by conveying to him the land, on which he then lived, to which he agreed: and accordingly a deed of conveyance was drawn, which (247) is absolute on its face. The plaintiff avers, that the said conveyance was intended only as a security for the money due on his note, and that it was expressly agreed between him and the defendant, that whensoever he paid up the money the land should be reconveyed to him: that at the time the deed was drawn, he mentioned to the writer of it, that such was the agreement, and wished him to so state it in the deed, when he was answered, it was not necessary, as the defendant only wanted his money, and would reconvey the land when that was paid. The bill further charges, that he by agreement with the defendant, continued on the land, raising crops and disposing of them as he pleased; and "that he has fully paid off and discharged said note;" that the defendant brought an action of ejectment against him, recovered judgment, and threatens to turn the plaintiff out of possession. It prays injunction and a decree for a reconveyance of the land.

The answer denies, that the conveyance was made for the purpose of securing the payment of the note, set forth in the complainant's bill; but that when he called upon the plaintiff to pay or secure the same, he the

plaintiff, himself proposed to sell the land to him absolutely in discharge of the note. He denies, that, either before or after the sale and execution of the conveyance, or at the time, any promise or agreement was made between him and the plaintiff, that the conveyance should be in trust, or that the defendant was to reconvey the land, when the note was discharged. On the contrary, that McKen, who drew the deed, read it over to the plaintiff, and explained to him its operation and effect—that it conveyed to the defendant absolutely all the interest he had in the land. The defendant denies, that, since the execution of the deed, he has received from the plaintiff one cent of money in discharge of the note, which has been surrendered to the plaintiff. The defendant denies, that it was agreed between him and the plaintiff, that the latter should continue (248) on the land and cultivate it, until he paid off the note. He admits he did continue on the land, but it was as his tenant and by special agreement from year to year. He admits his suit in ejectment, his judgment, &c.

Upon the coming in of the answer, a motion was made to dissolve the injunction, which was refused, the injunction continued to the hearing and replication taken to the answer. The cause was set for hearing, and transmitted to the Supreme Court.

Boyden, for the plaintiff.
Avery and *Craig*, for the defendant.

NASH, J. The answer fully meets the allegations of the plaintiff's bill. The deposition of McKen, who drew the deed of conveyance, states, that the deed was drawn for the absolute conveyance of the land by the directions of the parties; and that it was read over to the plaintiff, explained to him, and that he was told that it conveyed to the defendant, absolutely, all his interest in the land; that, before the deed was drawn, the plaintiff proposed to the defendant to mortgage the land to him as security for the debt; and that the defendant refused to take it upon that condition. He denies, that

the plaintiff wished that the deed should express upon its face any conditions, and that any conditions were mentioned of that character, or any conditions at all. According to this testimony, and it is not contradicted, the plaintiff executed the deed with a full knowledge of its contents—that it was absolute, and conveyed to the defendant all the interest he had in the land. Solemn instruments between parties, able to contract, must in the presumption of every Court be taken to declare the truth in regard to the subject matter of their contract, until error, mistake or imposition be shown. And where the conveyance is absolute on its face, it must be held to be absolute, until strong and clear proof be (249) shown to the contrary. The testimony of McKen is corroborated by the bill. It states distinctly that the plaintiff executed the conveyance, knowing it was an absolute deed; for, it states, that the plaintiff wished the conditions to be inserted in the face of the deed. This, it is true, is denied by the writer; Lewis v. Owen, 36 N. C., 290, King v. Kincey, Ib., 187. There is no evidence of any inadequacy of price, which sometimes influences the action of a Court of Equity in these matters. The land was held by the plaintiff in right of his wife, and the whole amounted to but seventy-five acres. To turn an absolute deed into a mortgage on that ground, the price must be grossly inadequate; McLaurin v. Wright, 37 N. C., 94. If there was satisfactory evidence of a previous agreement for a mortgage, the Court could not declare the deed here such, in the absence of all evidence of imposition, and where it is shown, that, at the time of its execution, the plaintiff knew he was executing an absolute deed.

PER CURIAM. Bill dismissed with costs.

(250)

THOMAS J. DEAVER vs. A. L. ERWIN.

A man, who is sued in an action of debt, and does not prove, on the trial at law, payments which he alleges he has made, can have no relief in equity, unless he can show some fraud or circumvention practised, to prevent his making the proof.

In regard to new matter, introduced by a defendant in his answer to an injunction bill, there is no distinction; Where the bill charges the receipt of money and a general accountability, and the answer admits the receipt, and seeks to account for the money by alleging its application to some particular purpose, then the injunction will not be dissolved on the answer; but where the bill charges a payment on a particular account, and the answer denies that any payment was made on that account, and accompanies the denial with an admission that a certain sum was received, as a payment on some other account; for there is no confession and avoidance by new matter, but a positive denial of the allegation, together with an explanation of a circumstance, relied on to give color to the allegation.

Appeal from the Superior Court of Buncombe County, Spring Term, 1851, his Honor Judge Settle presiding.

The case is stated in the opinion of the Court.

N. W. Woodfin, for the plaintiff.
Avery, for the defendant.

PEARSON, J. In 1837, the defendant placed in the hands of the plaintiff, for collection, three notes—one on Lewis, for $25, and two on Greenlee, the amount of which is not admitted by the pleadings. The plaintiff has collected the money; and in August, 1839, paid to the defendant $20, for which he took a receipt, reciting that it was on account of the debts on Greenlee. In 1846, the defendant demanded the balance, and soon thereafter brought an action at law, and recovered judgment for $170.

The plaintiff alleges, that, in the year 1838, he (251) paid to the defendant $25, the amount of the debt on Lewis. In 1840, he paid $45 to one Holcomb, for the defendant; and, in 1846, he paid to the defendant $15; but, as he had given no receipt—he required none—has no means of proving these payments, "except, perhaps, the one to Holcomb, by following him to

Kentucky"; and these three payments, with the $20, for which he has a receipt, he thinks, is about the amount of the debts, which he had undertaken to collect; but he made no entry, and cannot ascertain the precise amount of the notes on Greenlee.

He further alleges, that "the defendant brought suit against your orator to McDowell Superior Court of Law, on account of said debts; and, on meeting said defendant, at the Spring Term, 1850, he assured your orator that he would allow him all just credits, and come to a fair settlement. Your orator, with a view to settle the suit, and avoid the trouble of attending Court so far from home, proposed to pay him $25 for a compromise: That your orator verily believed and yet believes, that he had paid the defendant all that was due him (especially if your orator should be allowed a reasonable compensation for his trouble.) To this the defendant remarked, that he had to go home that evening, but would return next morning, and settle, but failed to do so; and afterwards promised to meet your orator at Buncombe, and settle, but failed to do so: and at Fall Term, 1850, in your orator's absence, and while he was relying on the defendant's promise to settle the matter amicably, the defendant pressed the trial, and obtained judgment for about one hundred and seventy dollars," of which the plaintiff was not informed until several months afterwards.

The prayer is for an injunction, except as to the sum of twenty-five dollars, which, the plaintiff alleges, will more than cover the amount fairly due to the defendant.

(252) The defendant denies, that he ever received any payment in respect to the money collected by the plaintiff, except the twenty dollars, for which he gave a receipt, and which was allowed as a credit on the trial at law. He avers, that the sum was all that the plaintiff had frequently assured him he had been able to collect, and he remained in ignorance of the fact, that he had collected the whole amount of the debts, until some time in 1846. As to the forty-five dollars, alleged to have been paid to Holcomb, he avers there was no such payment; and says, that, in 1838, he

purchased a note on said Holcomb, which was sold at public auction, at the price of forty-five dollars, and not having money enough about him at the moment, he borrowed part of it of the plaintiff, and at the same time gave him Holcomb's note to collect. A short time afterwards, he paid eighteen dollars in bank for the plaintiff, and after the note of Holcomb was collected, he allowed him to retain out of the money, a sum which, with the eighteen dollars, repaid the money borrowed.

As to the fifteen dollars, he denies that it was paid in respect of the debts, which the plaintiff had collected; and says, it was paid in part of a debt due him for professional services, and was so expressly agreed on at the time.

Further answering, the defendant avers, that, when he met the plaintiff, at Spring Term, 1850, of McDowell Superior Court, he was ready to try the suit, but the plaintiff suggested, "he would prefer to settle amicably": This defendant was about starting home, and told him to call on his attorney, who was authorized to act for him. This defendant was informed on the next morning, by his attorney, that no amicable settlement could be made. This defendant then notified the plaintiff, that negotiations were at an end, and he would press for trial at that term, if the case were reached; but it was not reached at that term. This defendant denies that the plaintiff offered him twenty-five dollars to compromise, at any time. He denies, that
(253) he agreed to meet the plaintiff at Buncombe Court and settle amicably, or that he gave him any reason to expect that the suit woud be settled in any other way, after Spring Term, 1850, than by a regular trial at law; and he denies, that the plaintiff was prevented from attending Court at the time of trial, by any promise of this defendant. On the contrary, he avers, that the plaintiff had express notice that the suit would be pressed for trial as soon as it was reached. And he is informed and believes, that the plaintiff knew the suit would be reached, and refused to attend of his own accord; that J. W. McElroy, one of the de-

fendant's witnesses, saw the plaintiff shortly before the Fall Term, 1850, of McDowell Court, informed him that the suit would be tried, and enquired if he was going to attend Court; whereupon, the plaintiff replied that he would not attend, for he relied upon the statute of limitations as his defence, and asks this defendant no favors in the suit. And the defendant avers, that the whole sum recovered by him at law, is justly due—the trial was fair, and the plaintiff appeared by counsel, who had been employed from the commencement of the suit."

The answer is full and satisfactory, and, we think, fully denies the plaintiff's equity.

The bill seeks to have a new trial in this Court, in respect to the alleged payments, which the plaintiff failed to prove upon the trial at law. If a party either will not, or cannot, make good his defence at law, it is his folly, or his misfortune. The fact, that he has made payments, will not, of itself, raise an equity against the judgment. There must be some fraud and circumvention practiced, whereby it is put out of his power to prove the payments.

It further alleges, (and this is the foundation of the plaintiff's equity), that he was, by false promises, induced not to attend Court, and "surprised" by a judgment being taken in his absence.

(254) It does not appear how the plaintiff was prejudiced by being absent at the time of the trial. If he had been present, he had no means of proving his payments; and, suppose he could have filed an affidavit, and continued the case to give time for a bill of discovery, it would have availed him nothing, because the result would have been the present answer, which positively denies the payments, and, of course, would not have aided in the trial of the issue, on the plea of payment. So that, as it turns out, he was, in fact, not prejudiced. But, apart from this view, the answer denies the fraud, circumvention, and false promises, out and out, and sweeps away the ground work of the plaintiff's equity.

It was insisted for the plaintiff, that, when the equity

of a bill was admitted, and new matter is set up as a defense, the injunction will not be dissolved on bill and answer. That is true; for, in such cases, the plaintiff's allegations are admitted, and the defendant has no proof of the allegation made by him.

It is not necessary to consider, how far the principle is applicable to this case; because the foundation of the plaintiff's equity has failed. But, as this point was pressed, it may be well to remark, that there is an obvious distinction between a case, where the bill charges the receipt of money and a general accountability, and the answer admits the receipt, and seeks to account for the money, by alleging its application to some particular purpose—and a case like the present, where the bill charges the payment on a particular account, and the answer denies that any payment was made on that account, and accompanies the denial with an admission, that a certain sum was received as a payment on some other account; for, there is no confession and avoidance by new matter, but a positive denial of the allegation, together with an explanation of a circumstance relied on to give color to the allegation.

(255) In this case a general allegation would not have answered the purpose. It was necessary to allege, that the payments were made on account of the money collected. This allegation is denied.

There is no error. The injunction ought to have been dissolved. This opinion will be certified. The plaintiff must pay the costs of this Court.

PER CURIAM. Ordered accordingly.

First paragraph head-note—*Approved.* Burgess *v.* Lovengood, 55 N. C., 457.

Vide. Fentress *v.* Robbins, 4 N. C.; Wilson *v.* Leigh, 39 N. C., 97; Powell *v.* Watson, 41 N. C., 94; Dyche *v.* Patton, 43 N. C., 296; Houston *v.* Smith, 41 N. C., 264.

Second paragraph head-note—*Approved.* Wilson *v.* Mace, 55 N. C., 5; Grantham *v.* Kennedy, 91 N. C., 148.

Whole case approved. Stockton *v.* Briggs, 58 N. C., 309; Molyneux *v.* Henry, 81 N. C., 106.

M. PATTON, ADM'R OF J. BAIRD, vs. WILLIAM R. BAIRD.

The object of a submission to an arbitration, is to put an end to litigation, and therefore the award must be final: and if it is not final, and thus the objects of the arbitration not completely answered, the consideration of the agreement fails, and either party may insist on setting it aside, and claim the right to stand in *statuo quo*.

Where the arbitration is a rule of Court, there is a further reason, that, unless the award be final, the Court cannot enforce it. In this State, judgments are entered upon such awards, and the parties are then out of Court.

After an award has been made, the arbitrators are *functi officio*, and have no more power to alter it, than a jury have to change their verdict, after it is rendered, and they discharged.

Arbitrators are no more bound to go into particulars, and assign reasons for their award, than a jury are for their verdict. Their duty is best discharged by a simple announcement of the result of their investigations.

The case of *Simpson* v *McBee*, 14 N. C., 531, cited and approved.

Appeal from the Superior Court of Equity of
(256) Buncombe County, Spring Term, 1851, his Honor Judge Settle presiding.

N. W. Woodfin, for the plaintiff.
J. W. Woodfin and *J. Baxter*, for the defendant.

PEARSON, J. The intestate and the defendant had for several years, dealt as partners in buying and selling land and other property; and on the 20th day of December, 1844, made a final settlement and division. They then agreed to deal as partners in buying, raising, and selling cattle, sheep and hogs: which copartnership continued until the death of the intestate in 1848, when the plaintiff administered and delivered to the defendant his share of such of the cattle, &c., as were in the possession of his intestate, and received of the defendant his intestate's share of such of the cattle, &c., as were in the possession of the defendant. The intestate and the defendant had also after 1844, purchased and held as partners, two parcels of land—the Roberts and the Kelyon tracts—and had, as partners, built a house and made a large quantity of brick.

The bill charges, that the intestate paid much more than his share of the price of the Roberts tract, and contributed more than his share of the labor and incidental expense in building the house and making the brick. The copartnership extended to horses and mules, as well as cattle, &c., and the defendant had on hand a number of mules belonging to the firm, which he refused to divide. It also extended to the family expenses of the partners, and the defendant refused to pay the one-half of the debts, contracted by the intestate for the support of his family. And there are many outstanding debts contracted for the firm, and for which the intestate had given his individual notes. The prayer is for an account.

(257) The defendant alleges, that he has paid his full share of the price of the land, and contributed his full share of labor and expense in building the house and making the brick, or nearly so, and, if he is at all in arrear, he is willing to pay whenever the amount is ascertained. He denies, that after December, 1844, the copartnership extended to any thing, except buying, raising and selling cattle, sheep, and hogs, and except the purchase of the two tracts of land and the house and brick. And he denies, that there are, to his knowledge, any notes given by the intestate for cattle, sheep or hogs, or for which the firm was otherwise bound, except three—one to the administrator of Wolf, of which a small part was for the purchase of cattle; one to Alexander, and one to Wilson; and of these he has paid or is willing to pay, his part; and, if there be any others, for which the firm is liable, he is willing to pay his part.

Upon the coming in of the answer, the cause was referred by a rule of Court. The arbitrators made their award and filed it on the 5th of March, 1851, as follows:

"M. PATTON, Adm'r of ISRAEL BAIRD, dec'd.
vs.
WM. R. BAIRD.

This case having been referred to the undersigned for settlement, and we having examined complainant's bill and defendant's answer thereto, also heard the testimony introduced by the parties, and argument of counsel thereon, beg leave to report the following, as the result of our investigation, to-wit. First: That Israel Baird and Wm. R. Baird were joint owners of two tracts of land, purchased since December 20th, 1844, to-wit: the Pearce Roberts or Cassuda, and the Lester or Kelyon tracts; and that the claim of the said defendant to the half of the sale thereof is right.

"Second: That they were jointly interested in the buying, raising and selling of cattle, sheep and hogs; but not in horses and mules.

"Third. That the debt to the estate of W. (258) Wolf, for stock is joint, except $47, that being the individual debt of the defendant, Wm. R. Baird; also the debt to the estate of N. Alexander is joint; the debt due to F. M. Wilson is made up of $37 or $38, due by I. Baird, and $7 or $8 by said W. R. Baird; all outstanding debts for cattle, if any such, are joint. "Fourth. The debt of $425 is chargeable to I. Baird's estate, and due to said W. R. Baird.

"Fifth. We charge defendant with $125, it being a deficiency on his part in work and furnishing lumber towards making the 60,000 bricks and building house; which sum the said defendant is to pay to the plaintiff.

"Any other charges in said bill, we consider as settled, and need not be especially mentioned in this report.

"All of which is respectfully submitted,

JAS. W. PATTON,
W. D. RANKIN,
JAS. M. SMITH."

"March 5th, 1851.

At April Term, 1851, the plaintiff moved to set aside

the award, because it was uncertain in many particulars, and because it was not final.

The defendant insisted that the award was valid; but to obviate all objections, moved the Court to allow the arbitrators (who were then present), to withdraw the award and amend it, so as to make it certain and final. To this the plaintiff objected. The Court refused the motion and set aside the award.

The objection, because of the omission to decide as to the costs, cannot be sustained. In such cases, each party pays his own costs.

All of the other objections, except two, are met by the rule, "*id certum est, quod certum reddi pot-*
(259) *est.*" The seeming uncertainties can be removed by reference to the pleadings, and by simple calculation.

This part—"the debt to Wilson is made up of $37 or $38, due by I. Baird, and $7 or 8, due by W. R. Baird"—is uncertain, and cannot be aided by the above rule. It is a small matter, and, probably, might be obviated by the defendant's submitting to take it most strongly against himself. We would consider of this, but for the fact, that the other objection is fatal.

The award is not final in this. "All outstanding debts for cattle, if any such, are joint." Thus, upon its face, leaving the question, which of the outstanding debts are for cattle? open for further litigation.

The object of a submission is, to put an end to litigation in reference to all matters embraced in it. If this object is not completely answered, the consideration of the agreement fails, and either party may insist upon setting aside the award, and claim the right to stand in "*statuo quo.*" That an award must be final, is a settled rule, in reference to all submissions. Where it is a rule of Court, besides the reason above stated, there is the further one, that, unless it be final, the Court cannot enforce it. In this State, judgments are entered upon such awards, and the parties are then out of Court; Simpson v. McBee, 14 N. C., 531.

No judgment can be rendered upon this award; and, consequently, the Court cannot enforce it. Suppose the

plaintiff pays off a note of the intestate, and insist it was given for cattle. The defendant insists it was given for family expenses or mules. The parties being out of Court, this question can only be settled by another suit.

It is said, however, there is no evidence of the existence of any other debt for cattle, except the three set out in the award. The reply is, the award, upon its face, leaves this question open, and the plaintiff has had no opportunity, and has not been called on, to show, whether there be any other such debts or not. (260) There are many outstanding debts against the intestate. The defendant can only, in a qualified manner, say, none of them, within his knowledge, are for cattle; and he supposes the possibility of such a thing, by saying, if there be any such, he is willing to pay his part, whenever the fact is ascertained.

How is it to be ascertained? The arbitrators ought to have come to a conclusion upon the subject, and made it a part of the award. To do so, it was necessary to take an account of the debts of the firm, to call on the plaintiff to show what debts, if any, were contracted for cattle, sheep, or hogs, and to decide definitely, how far the defendant was liable to contribute. This would have concluded the parties, and put an end to all controversy.

The confident belief of the defendant, that there are no such debts, increases the probability of renewed litigation, should the plaintiff come to a different conclusion in regard to any of the debts. It is, therefore, apparent, that the submission has not answered the purpose for which it was intended the consideration moving to it has, (to some extent, at least,) failed; and the plaintiff, consequently, has a right to insist upon being allowed to pursue his remedy before the regular tribunal, in which his suit is instituted.

The motion to allow the arbitrators to withdraw the award and amend it, was properly refused. After an award is made, the arbitrators are "*functi officio*," and have no more power to alter it, than a jury has to change their verdict, after it is rendered, and they are discharged.

It may not be amiss to add: arbitrators are no more bound to go into particulars, and assign reasons for their award, than a jury is for its verdict. The duty is best discharged by a simple announcement of the result of their investigations.

The arbitrators have announced no conclusion upon the two questions, which we have considered; and the effect of the defendant's motion is, to refer the matter back, so that they may decide upon questions (261) which they had left undecided. This the Court had no power to order or allow, without the plaintiff's consent.

Although disposed to sustain awards, we feel obliged to concur with his Honor. There is no error.

This opinion will be certified: and the cause will proceed, as if there had been no reference.

PER CURIAM. Ordered accordingly.

Approved. Eaton *v.* Eaton, 43 N. C., 102; King *v.* Neuse Mfg. Co., 79 N. C., 360; Osborne *v.* Calvert, 83 N. C., 365; Crawford *v.* Orr, 84 N. C., 246; Cheatham *v.* Rowland, 105 N. C., 218.

ISAAC VANHORN AND AL. vs. ALEXANDER DUCKWORTH AND AL.

Where a mortgagee, or one for the security of whose debt or responsibilities, a deed of trust is given, dies, his personal representative is an indispensable party to a bill for the foreclosure of the mortgage, or the execution of the trust.

The principle of equity in respect to parties, is, that all persons interested in the subject of a suit, ought to be before the Court, so as to be concluded by the adjudication, and thus will be avoided the vexation and expense of further litigation of the same matter, by an omitted party in interest.

On a demurrer to a bill, a defendant is not confined to the causes of demurrer assigned in it, but may insist *ore tenus* on others.

Appeal from the Court of Equity of Burke County, Fall Term, 1850, his Honor, Judge Dick presiding.

(262) *Gaither*, for the plaintiffs.
Bynum and *Avery*, for the defendants.

The bill was filed in April, 1850, against Alexander Duckworth and his wife, Nancy, and it states that the defendant, Alexander, was indebted to Charles McDowell, as the guardian of an infant, in the sum of $767, and, to secure the same, that he, and John Vanhorn, as his surety, executed their bond therefor to McDowell, as guardian, on the 18th of April, 1843: and that, in order to indemnify Vanhorn, and save him harmless, Duckworth, at the same time, conveyed to Vanhorn in fee, a house and two lots in Morganton, in trust, in case Vanhorn should be in danger of being compelled to pay the debt, to sell the premises for ready money, and therewith discharge the principal and interest that might be then due on their bond: That the premises were, at that time, a sufficient security for the debt; but that no part of the principal or interest hath been paid, as the plaintiffs believe, and the debt has thus been allowed to accumulate, until the amount probably exceeds the value of the premises conveyed to Vanhorn, by way of counter-security, which have been, and are in the possession and enjoyment of the defendant, Alexander, and are becoming dilapidated; and that he, Duckworth, has but little other property, and is embarrassed by other debts, to a greater amount than the value thereof: that Vanhorn died in January, 1848, and that the plaintiffs and the defendant, Nancy, are his children and heirs at law: That, after such long forbearance, the defendant, Alexander, cannot reasonably expect more, but ought to pay the debt in exoneration of Vanhorn's estate, or that he and his wife ought to unite in a sale of the premises, which they refuse to do. The prayer is, that the defendant, Alexander, be compelled to discover what sum is due to McDowell, and that the sum be ascertained, and that a sale of the
(263) premises may be made under the direction of the Court, and the proceeds applied, as far as necessary, to the payment of the sum that may be found due. The defendant put in a demurrer, because McDowell

was not made a party; which, on argument, was overruled; and the defendants were allowed to appeal.

RUFFIN, C. J. The Court considers the decree to be erroneous. The defendants are not confined to the cause of demurrer assigned in it, but may insist, *ore tenus*, on others. Without saying definitely, whether McDowell be a necessary, as well as a proper party, the opinion of the Court is clear, that the personal representative of Vanhorn is an indispensable party. The principle of equity in respect to parties is, that all persons interested in the subject of a suit ought to be before the Court, so as to be concluded by the adjudication, and, thus avoid the vexation and expense of future litigation of the same matter by an omitted party in interest. This principle clearly embraces the personal representative of Vanhorn, as the personal estate might be damnified, and is primarily liable on the obligation of Vanhorn, as it appears upon the statement in the bill; and, therefore, the personal representative would have a right to call for an application of the proceeds of the conveyed premises to his indemnity. This would be true, if the bill were *quia timet*, to prevent loss to the plaintiffs, as heirs at law of their father, or some of them, since the personal estate would likewise be liable for the debt, and, indeed, primarily so, as between it and the realty. But the case of the plaintiffs, as made in the bill, is not even as strong as that; for, it is not stated that the ancestor left any real estate to descend to his heirs, excepting only the mortgaged premises. Hence, the plaintiffs are in no possible danger of loss out of their own property—that is, out of property which is theirs in the view of this Court. The bill is filed by them
(264) merely in the character of part of the heirs, upon whom, on the death of the mortgagee, the mortgaged premises descended, and their only interest is that of some of the trustees in trust for the debtor, and the personal representative of the surety, and, upon the equity of substitution, for the creditor. If a bill by some of the trustees against the others, to compel the latter to join in a sale, will lie, at all, without request

from the debtor, the representive of the surety, or the creditor—they not appearing to be under incapacity—it seems certain, that it will not, without the estate of the surety, at least, being represented. For, although trustees may proceed to sell, under a power of trust to that end, without applying to the Court to have the debt ascertained, yet the Court will not, at the instance of part of them, more than at that of the creditor, or other person claiming a benefit under the deed, decree a sale and require the other trustees to join in it, without its being established, that there is a debt, and what the amount of it is. The Court may not restrain trustees from selling upon their responsibility: but, at the same time, the Court cannot be active in compelling them to sell, without first being satisfied, that there ought to be a sale, and to what extent it should be made. That depends on the enquiry, whether there is is a debt, and what it is. This bill admits that, by asking for an account from the defendant, Alexander, and praying that the debt may be ascertained. But, in order to an enquiry on that point, and to render its result conclusive, so as to protest the present parties, it is at least necessary that the *cestui que trust*—that is, the surety, or the representative of his estate, should be heard on the enquiry. Perhaps McDowell, the creditor, may be a necessary party, since he might indirectly derive a benefit under the deed. But that need not be considered now, since the surety, for whose indemnity it was the direct purpose and effect of the deed to provide, ought to be represented in this suit, in order to prevent these parties from being exposed to a future suit by (265) the personal representative, for the same matter.

It must, therefore, be certified to the Court of Equity, that the decree is erroneous, and should be reversed, and a decree made, sustaining the demurrer, and dismissing the bill with costs. The plaintiffs must pay the costs in this Court.

PER CURIAM. Ordered accordingly.

M. A. BAIRD, Sen., vs. W. R. BAIRD & AL.

Where two clauses in a will are entirely inconsistent, one with another, the latter must prevail; but, to produce this effect, the two clauses must be entirely inconsistent and incapable of reconciliation.

Where a testator, in one clause of his will, directed that his wife should "have a decent and comfortable support to be derived from all his lands and tenements," and, in a subsequent clause devised to his son A. in fee simple a part of his lands, and the clause proceeded, "subject nevertheless, to a charge of five hundred dollars, to be paid by him, his heirs, &c., to his brother James M. Baird, as soon as he, the said James M. Baird, shall have completed his studies, &c.; a good and sufficient voucher for the payment of the said sum of five hundred dollars, &c., shall vest in him, his heirs or assigns forever, a good, pure and absolute estate of inheritance in the said lands and tenements: *Held*, that, notwithstanding this charge in favor of James R. Baird, the land so devised was also subject to its proportionate share of the charge in favor of the wife.

Appeal from the Court of Equity of Buncombe County, Spring Term, 1851, his Honor, Judge Settle presiding.

(266) *J. W. Woodfin* and *J. Baxter*, for the plaintiff.
N. W. Woodfin, for the defendants.

In 1839, Bedient Baird died, having previously duly made and published his last will and testament, in which he devises as follows:

"Secondly. I give and bequeath unto my beloved wife, Mary Ann, in case she survive me, a decent and comfortable support, to be derived from all my lands and tenements for and during the term of her natural life; and that the full and absolute right of all my household and kitchen furniture vest in her, together with one horse, saddle and bridle of good quality; and also that she have the full, free and unlimited control of my negroes, Edward, Nancy, Adelia, and Eliza, and their issue, during her natural life; after which it is my will and desire, that said negroes and such issues as they may have from this time forward, be equally and fairly divided between my sons, Israel Baird and William R. Baird, share and share alike, except the said girl Eliza,

who then with her issue goes to the said William R. Baird exclusively.

Thirdly. I give and bequeath to my son Israel Baird, my five tracts of land, situate, lying and being in the State and county aforesaid, on Beaver Dam Creek, and the waters thereof, including the place where he now lives, containing in all eight hundred acres, more or less, to have and to hold to him and his heirs forever: subject, nevertheless, to a charge of five hundred dollars to be paid by him, his heirs, executors or administrators, to his brother James M. Baird, so soon as he, the said James M. Baird, shall have completed his studies and obtained a diploma, or in a reasonable time thereafter; a good and sufficient voucher for the payment of the said sum of five hundred dollars to the said James M. Baird by the said Irael Baird, according to this my will and desire, shall vest in him, his heirs or assigns forever, a good, pure, and absolute estate (267) of inheritance in the said lands and tenements. I also give and bequeath unto my said son Israel Baird and his heirs, the following negroes, to-wit: one man named Perry, one named Mingo, and one girl named Clara, together with all and singular the issue of her, the said girl Clara, which may be hereafter born, to have and to hold all and singular the said three negroes to him and his heirs forever.

"Fifthly. I give and bequeath to my son, William R. Baird and his heirs or assigns forever, all that tract of land, whereon I now live, containing five hundred and thirty-one acres, more or less, together with my negroes Joe, Henry and Mary, with all the issue of the said Mary from this time forward, to have and to hold the said negroes, with the issue of the said Mary, to him, the said William R. Baird, and his heirs forever.

Sixthly. I will and bequeath to my son James M. Baird one negro boy named Lawson, and one horse, saddle and bridle, worth at least sixty dollars, with the payment of which five hundred dollars I have and do hereby charge the lands herein devised to my son Israel Baird, making the same payable as soon as he, the said James M. Baird, shall have completed his studies and

obtained a diploma, or within a reasonable time thereafter."

The land devised to the two sons, Israel and William R. Baird, constituted the whole of the real estate of the testator. The bill is filed to procure an exposition of the clauses in the will, that are herein set forth. The plaintiff is the widow and devisee mentioned in the second clause. The bill charges, that she is entitled to a comfortable and decent support out of the whole of the lands so devised during her natural life: That she has never heretofore made any request of her two sons to make any such provision for her, as she is entitled to, and her son Israel having died intestate, and without having made any such provision, his representatives and heirs refuse to do so, or to aid and assist in so doing, alleging, "that no provision was intended to be
(268) made, so far as concerned the lands and tenements devised to the said Israel Baird, but that the same was intended solely to be a charge on the real estate devised to William." The bill prays that a decree may be made securing to her such a provision as was devised to her, out of the lands of William Baird, and that descended to the heirs of Israel Baird, and which are held by them through their father under the will of Bedient Baird, their grandfather. All the parties interested in the controversy are before the Court. The answers of the heirs at law of Israel Baird allege, that by the will of Bedient Baird the devise to their father, Israel Baird, was not charged with the maintainance of the widow but that the only charge upon it was the sum of five hundred dollars to his son James, which, they allege, has been paid.

The case was set for hearing, and transferred to the Supreme Court.

NASH, J. The governing rule in the construction of wills is the intent of the testator. We must endeavor to get into his mind, and, from what he has written in his will, ascertain, as well as we can, what were his purpose and wishes in the matter. If not inconsistent with law, and it be sufficiently certain, that purpose must be

carried out. No one can be in doubt as to the intention of the testator, as expressed in the second clause. He therein makes provision "for the decent and comfortable support of his wife during her lifetime." This was a high moral, as well as legal obligation on him. She had been his companion and friend, and with him may have toiled through many a weary day, in accumulating the property he was about to dispose of; and surely no higher earthly duty could rest upon him, than to provide for her comfort during the remainder of her pilgrimage, when deprived of his protection and care. But it is a duty which the law enforces, and which a husband can, by no testamentary provision, so far as his (269) real estate is concerned, deprive her of. The testator in this case was aware of his duty, and it appears to have been with him a paramount motive. According, then to the second clause of the will, her maintenance is made a charge upon all his lands. The words are, "to be derived from all my lands and tenements." The difficulty is created by the third clause, in which the testator gives to his son Israel five tracts of land, containing eight hundred acres, "to have and to hold to him and his heirs forever." This, if it had stopped there, was a devise of a fee simple absolute, simply charged as in the second item. The testator goes on to say, "subject, nevertheless, to a charge of five hundred dollars, to be paid by him, his heirs, executors or administrators, to his brother, James M. Baird," &c., "a good and sufficient voucher for the payment of the said sum of five hundred dollars to the said James M. Baird, by the said Israel Baird, according to this will and devise, shall vest in him, his heirs and assigns forever, a good, pure, and absolute estate of inheritance in the said lands and tenements." That this devise creates a charge upon the land, of five hundred dollars, there can be no doubt; and by the heirs of Israel Baird it is contended, that it is inconsistent with that contained in the second clause, and abrogates and makes it void. It is said, that where two clauses in a will are entirely inconsistent, one with the other, that the latter must prevail—upon the principle, that the

first deed and last will must stand. To produce this effect, however, the two clauses must be totally inconsistent, and incapable of reconciliation. 1 Roper on Legacies, 328. If they can be reconciled, they can both stand—upon the principle, that every part of a will shall have some effect given to it. Thus, if property be given to A, by one clause of a will, and by a subsequent one, the same property is given to B, they shall hold as joint tenants, or tenants in common; and thereby, each takes benefit under the will. The inconsistency between (270) the clauses we are considering, consists, it is said, not in the double charge upon the land, but in the peculiar phraseology of that portion of the third item, which devises the land to Israel Baird. The obtaining a receipt from James, of the payment of the five hundred dollars, shall vest in him "a good, pure and absolute estate of inheritance." The effect and purpose of this clause is to me obvious. He did not mean, that, upon the performance of that condition, he should hold the land discharged of the maintenance, charged upon it in the clause immediately preceding. In the first place, he charges the whole of his real estate with the widow's maintenance. He does not choose to make her comfort dependent upon any particular part or portion of it. His desire is, that she should be maintained in that style, and in that abundance she had been accustomed to. And it is not perceived with what propriety the Court can restrict it to a part. Again, the whole of his land, all that he actually owned, is devised to his two sons, Israel and William R. Baird. We are not informed of the value of the respective devises, but we are told in the will, that Israel's share contains eight hundred acres, and William's five. But he has another son, James, to provide for, and instead of making his legacy a charge upon all the land, he confined it to the portion given to Israel. Why is this? It is fair to presume that the testator intended thereby to equalize the two devises. But this intention is utterly destroyed, if it is held, that the payment of the legacy to James by Israel discharges the claim of the widow upon his land, whereby the whole burden will be thrown upon William.

By such a construction, the widow's security will be greatly diminished, and the charge upon William greatly increased. Let us suppose, however, that, instead of making the five hundred dollar legacy to James, a charge upon Israel's devise, he had subjected William's also, to it, and annexed the same condition to the whole. Could it be supposed, for a moment, it was the intention of the testator, that, upon the payment of (271) the five hundred dollar legacy, the provision made for his widow should cease. To provide for his widow appears to be a primary object with him—he was not disposed to throw her upon the measured bounty of the law. There is another rule of construction applicable to this will, or the clause we are considering—if a devise be so worded, that no meaning can be affixed to it, and the will furnish no clue to ascertain the meaning, the bequest must necessarily be void for uncertainty. 2 Roper on Legacies, 329. Now, in the first part of the third item, an estate in fee simple is given to Israel in the land mentioned in it—which is an estate of inheritance—by the performance of the condition annexed in the after part, no greater estate is created. This latter clause, then, is insensible, and can have no operation in enlarging the estate of Israel, or freeing it from an incumbrance, from which it was not freed by the preceding part. But it is preferred to give to the words, "a good, free, and absolute estate," the exposition hereinbefore attached to them. That exposition is aided by the consideration, that, by it, each clause in the will has a practical effect given to it. We cannot consent, that the provision made for the widow in the first clause, which is certain, shall be controlled by a subsequent disposition, which is doubtful and uncertain in its meaning—to say the least of it, it would be the reversal of the rule, *id certum est, quod certum reddi potest.*

It must be declared, that the plaintiff, Mrs. Baird, is, under the will of her husband, Bedient Baird, entitled to a maintenance; and that it is a charge upon the real estate of the testator, of which he died seized and possessed. There being no evidence that the testator had,

at the time of his death, any other real estate but that devised to Israel Baird and William R. Baird, it is referred to the Master, to enquire, what will be a proper annual allowance, over and above her estate, which will be a decent and comfortable support for the (272) plaintiff, regard being first had to her sitation and condition, and manner of life, during the life of her husband; which, so ascertained, will be declared a charge upon the land devised to Israel and William R. Baird—to be paid by them, on or out of their estates devised, in just proportion to the respective values of the devises, after deducting from Israel's the legacy to James; and the Clerk and Master will report the value of said devises, upon the principle designated.

The plaintiff does not claim any allowance prior to the filing of the bill.

PER CURIAM. Decree accordingly.

JOHN D. DAVIDSON & AL. vs. H. L. POTTS & AL.

It is only through the medium of the personal representative, that Courts will interfere in the administration of a deceased persons' estate. Such representative is the proper person to collect in the assets and to be answerable to those who may be entitled to them.

Therefore, one portion of the next of kin cannot sue another portion, in matters pertaining to a intestate's estate, without having an administrator as a party.

And it makes no difference that those who wish to sue reside out of the State and cannot procure letters of administration.

A Court of Equity can no more dispense with proper parties to a case, than a Court of Law; nor can the fact of there being no person qualified to prosecute a legal claim before a legal tribunal transform the case into an equitable one, and thereby give jurisdiction to a Court of Equity.

The cases of *Spack* v. *Long*, 22 N. C., 60; *Alston* v. *Batchelor*, 41 N. C., 269; *McNair* v. *McKay*, 33 N. C., 602, and *State* v. *Britton*, *id.*, 102, cited and approved.

Appeal from the Court of Equity of Haywood County, Fall Term, 1850, his Honor, Judge Dick presiding.

(273) *N. W. Woodfin* and *J. W. Woodfin*, for the plaintiff.

J. Baxter and *Henry*, for the defendants.

John Davidson died in the year 1845. After his death, a paper-writing, purporting to be his last will and testament, was offered for probate in the County Court of Haywood, where he lived and died, by the defendant Potts, who was therein appointed its executor. It was proven in common form, and without notice to any of those interested. Subsequently, the probate was duly, and by the proper Court revoked, and the letters testamentary called in, the paper-writing again propounded, and an issue of *devisavit vel non* made up by the Court. This issue is still pending in the Superior Court of Haywood. No administration *pendente lite* has been granted on the estate of John Davidson. The bill is filed by a part of the next of kin of the deceased against H. L. Potts and his wife Eve, who is one of the children of John Davidson, and against his widow, Mrs. Davidson and others, his next of kin. It alleges, that, under the paper-writing so propounded, the defendants, Potts, took possession of the whole of the personal estate of the deceased, and, together with Mrs. Davidson, the widow, has sold several of the negroes to persons residing out of the county of Haywood; and "that the plaintiffs are fearful the said H. L. Potts and the said Margaret will send said slaves beyond the limits of the State before said suit can be tried, and verily believe he will do so." The bill prays for a writ of injunction and sequestration, both of which were granted, and were duly executed.

Upon the coming in of the answer, a motion was made to dissolve the injunction, which, upon argument, was refused, and it was continued to the hearing, and the cause removed to the Supreme Court.

NASH, J. The bill in this case cannot be sustained in any point of view. The parties, both plaintiffs (274) and defendants, are the next of kin of John Davinson, standing in equal relation to him, and equally entitled to a due proportion of his personal prop-

erty—but none of them are entitled, in law, to its present possession, or to call upon a Court of Equity to interfere in its administration. If the next of kin, without the consent of the executor, where there is one, possess themselves of it, they are trespassers, and are accountable to the representative; and, if they take such possession, where there is no will, and before the appointment of an administrator, they make themselves executors of their own wrong, subjecting themselves to all the responsibilities of a regular executor, without many of his immunities. The bill states, that no administration upon the estate of John Davidson, *pendente lite*, has been granted. During the pending of the issue of *devisavit vel non*, the paper-writing propounded is not his will, and cannot be so considered, until so found by a jury of the country. It was the duty of the County Court, upon a proper application, to have appointed an administrator *pendente lite*, whose right it would have been to have taken into his possession all the personal property of the deceased, wherever found within the State. It would have been his duty to sue for, and recover the slaves belonging to it, as well those in the possession of these defendants, as those in the possession of the purchaser from them. The property would then have been safe from the risk now apprehended. It is only through the medium of the personal representative, that Courts of law will interfere in the administration of a deceased person's estate. Such representative is the proper person to collect in the assets, and to be answerable to those who may be entitled to them. Spack and Long, 22 N. C., 60; Alston and Batchelor, 41 N. C., 269; McNair and McKay, 33 N. C., 602; State v. Britton's Adm'r, Id., 102. The plaintiffs aware of this difficulty in their way, state, that they reside out of the State, and could not procure letters of administration. This cannot alter the law. Gen-
(275) eral laws cannot cover each particular case that may arise but constitute a general system, to which particular cases must conform. Both in law and equity, cases are governed by fixed principles; and, in this particular, the latter Court has no more discretion

than the former. Bond and Hopkins, 1 Sch. & Let., 428, 1 Sto. Eq. s. 20. A Court of Equity then can no more dispense with proper parties to a case than a Court of Law; nor can the fact of there being no person qualified to prosecute a legal claim before a legal tribunal transform the case into an equitable one, and thereby give jurisdiction to a Court of Equity. A clear legal remedy or course existed in this case, and to that course the parties must be referred. The protection, which a Court of Law was competent to afford to the plaintiffs, is as effectual and ample as that which they seek in this Court. It was the duty, then, of the complainants to have caused an administration *pendente lite* to have been granted.

If, however, this legal objection did not exist, the relief sought for could not be granted. The plaintiffs did not present a statements of facts, authorizing the use of the power of a Court of Equity to take property out of the hands of him, who is in the possession of it. If they were equitably entitled to claim it, they do not allege any facts, showing that their fears of its removal are well founded. Selling some of the negroes within the State is no such fact.

PER CURIAM. Bill dismissed with costs.

(276)

JAMES ALLEN AND WIFE vs. L. B. BRYANT & AL., Adm'r, &c.

Dealings between a trustee and a *cestui que trust*, in reference to the trust fund, are not prohibited; but are watched in this Court with great jealousy, and the trustee is required to show affirmatively, that the dealings were fair and for a reasonable consideration, so as to exclude all suspicion that any advantage was taken of the influence, which the relation in most cases creates.

The cases of *Turnage* v. *Turnage*, *ante*, 127, and *Boyd* v. *Hawkins*, 17 N. C., 195, cited and approved.

Appeal from the Court of Equity of Rutherford County, Spring Term, 1851, his Honor, Judge Settle presiding.

Bynum, for the plaintiffs.
Gaither, *J.*, and *G. W. Baxter*, for the defendants.

PEARSON, J. The plaintiff, Mrs. Allen, was the widow of Ambrose Mills, who died in 1848, leaving a will, by which he bequeaths as follows:

"Thirdly. I give to my beloved wife the right and privilege of residing in my mansion house, together with the use of a sufficient quantity of adjoining land to support her well and comfortably during her life, (and if she desires it, to have one-third of my lands laid off to her during her life.) But it is my wish, that the whole of my lands, intended for her support, should be in the possession and under the control and management of my son William, as it is to be his after death, by satisfying and supporting her. I also give her a negro girl Maria, absolutely; also old Grey and Milly, his wife,
(277) and Maria's four children, Button, Larkin, Mack and George, and the following stock, to wit: two horses, four cows and calves, ten sheep and twenty hogs, to be selected by her out of the stock in hand, during her life, and at her death, the stock to be equally divided between, &c., "and Button, Larkin, Mack and George, to be divided between," &c. By another clause he gives her two beds and furniture, and a bureau; and he devises the home place and the lands ad-

joining to his son William E. Mills, "subject to the support of his mother for life, as before provided."

William E. Mills was appointed executor. He qualified and assented to the legacies. In January, 1849, Mrs. Mills and William E. Mills executed the following deed:

"STATE OF NORTH CAROLINA—Polk County.

"This agreement, made and entered into this 1st day of January, 1849, between Ann F. Mills of the one part, and William E. Mills of the other part, witnesseth: That, whereas, by the provisions of the last will and testament of Ambrose Mills, deceased, the said William is to have the possession and control of the real and personal property left to the said Ann F. (or Nancy, as she is called in the will), his mother, by supporting her well and comfortably during her life, now it is agreed by the said William and Ann for the mutual benefit of each other, and in order that there shall be no misunderstanding hereafter by any of the parties interested—the said William will and he does hereby give up and surrender to his said mother, Ann F., two rooms in the late dwelling house of the said Ambrose for her separate use, and over which she is to have the entire management and control, and in which she is to keep her own beds and furniture. He also gives her the entire use and control of a negro girl, Maria, to wait on her, clothe herself and negro children, and to do anything and everything she may wish and direct. And the said William doth further agree and bind himself to support his said mother and her negroes well and comfortably during her life—that is, he is to furnish all the provisions and necessaries at his own expense, and his said mother is to come to his table as one of the fam-
(278) ily, without any trouble and expense on her part; and he is also to furnish her with a horse to ride whenever she desires it.

And the said Ann F. Mills does hereby covenant and agree on her part, for and in consideration of the foregoing stipulations, to surrender, and she does hereby

surrender and give up and relinquish to the said William all the remainder of the dwelling house, lands and negroes, for the entire management and control of said property left to her under the said will; and she does also surrender unto the said William all her part of the stock absolutely to manage and do with as he pleases, the said William being bound as before stated, to support his mother well during her life or so long as they may live together. And we, the said Ann F. and William E. do hereby bind ourselves to each other, our heirs, executors and administrators, well and truly to perform the foregoing covenants and agreements. In witness whereof, we have herewith set our hands and seals, the day and date above written.

"ANN F. MILLS. [Seal.]
"WILLIAM E. MILLS. [Seal.]

The parties acted under this deed until August, 1850, when William E. Mills died, leaving him surviving a widow and three infant children, who are defendants, and leaving a last will and testament, by which he gives his estate to his widow and children. The will was duly proven, and the defendants, Bryan and Mills, were appointed administrators with the will annexed. Soon after the death of William E., the plaintiff, Mrs. Mills, intermarried with the other plaintiff, Allen, and a controversy arising as to the legal effect of the deed, this bill was filed. The plaintiffs insist, that the intent of the deed was to make a mere temporary arrangement, by which to define the rights of the parties, for their mutual satisfaction; which arrangement was to be revocable at the pleasure of either party, and was, as a matter of course, to be at an end upon the death of William E. Mills, whose personal service, in taking charge of, and managing, the property, and the right to "come to his table as one of the family," (the consideration which induced the plaintiff, Mrs. Allen, to enter
(279) into the agreement), could no longer be rendered or enjoyed. And the plaintiffs insist that, if the legal effect of the deed is to vest all of the interest and estate of Mrs. Allen in William E. Mills, as his property,

the deed ought to be declared void and of no effect; because it was executed in ignorance of her rights, was obtained by surprise and without consideration, and by the exercise of an influence growing out of the relation in which the parties stood to each other. The prayer is for an account, and a surrender and re-conveyance of all interest or estate acquired by William E. Mills, under the deed, and an allotment of one-third of the land of her deceased husband.

The defendants deny, that the deed was intended as a mere temporary arrangement, and lost its binding force and effect by the death of William E. Mills. On the contrary, they insist, that its legal effect was to vest in him, as his property, all the interest and estate of the plaintiff, Mrs. Allen, in the land, negroes and stock, to which she was entitled under the will of her former husband. They deny, that she was ignorant of her rights, surprised, or in any way unduly influenced; and they aver, that the agreement was fair and reasonable, for the consideration therein expressed. They further aver, that none of the negroes, except the woman Maria, could have been hired for anything, Grey and his wife being very old, and the four boys being between the ages of eleven and five years; and Mrs. Allen had no means of providing for the support either of the negroes or of the stock; so that, if she had kept them, she would have been compelled to go in debt, and "would, probably, (almost inevitably), be so deeply insolvent for their support, that she would be compelled to sell them, and leave herself without support in her old age, dependent upon the bounty of her friends. These things she often repeated to William E. Mills, and importuned him to take a conveyance of all of her property, except Maria and the two beds and bureau, and bind (280) himself to support her; and, in pursuance of her urgent solicitations, the deed was executed. They insist on their rights.

Replication was taken, and the cause set down to be heard.

The plaintiffs are entitled to the relief prayed for. Adopting the construction contended for by the de-

fendants, the deed cannot in this Court be set up as a bar to the plaintiffs' rights, for three reasons. First. It was executed by Mrs. Allen in ignorance of her rights. It contains a recital, that William E. Mills, by the will of Ambrose Mills, "is to have the possession and control of the real and personal property left to the said Ann, by supporting her comfortably during her life." Here is an entire mistake, so far as the personal property is concerned. Again, she supposed she had no means of supporting her negroes and feeding the stock—in fact, according to the answer, she thought she was at the point of starvation, and in danger of becoming the object of charity: whereas, by the will, she had a right to use a sufficient quantity of the land to support herself "well and comfortably:" which, of course, gave her the right to use enough of the land to keep up her establishment, and to support the hands and stock, necessary for its proper cultivation and enjoyment, as a means necessary to support herself well and comfortably.

Second. The deed was obtained by surprise and without consideration. Under the will she had a right to reside in the mansion house, to use enough of the land to support herself and keep up her establishment. Maria was a good hand. Two of the negroes were old, but four were just becoming valuable; and she had two horses, cows, sheep and hogs. All this she transferred, for what consideration? The use of two rooms in the mansion house, the right to sit at the table, the use of a riding horse, and the use of Maria, as a waiting maid, but Maria was to clothe herself and the four boys, her children; and William E. Mills was to support her
(281) and the negroes—"that is, he is to furnish all the provisions and necessaries at his own expense;" and is to have the use of the negroes, horses and stock absolutely. This case fall precisely under the decision of Turnage v. Turnage, *ante*, 127. There, Elias Turnage, being entitled to some negroes, receives two of them and in consideration thereof, executes a release for all the negroes bequeathed. The Court say: "It is a clear case of surprise; being entitled to four negroes,

he receives two of them and executes a receipt in full. If the two received had been other than those he was entitled to, and of more value, it might have amounted to a satisfaction; but, as they were two of the four, it is impossible to hold, that it was in satisfaction of the four." It may be added, the security of the plaintiff was weakened; for, she gave up a charge on the land and accepted instead thereof, a personal covenant, and put it in the power of William E. Mills, to convey the land free of the charge.

Third. The relation of the parties—that of trustee and *cestui que trust*—is a conclusive reason. Dealings between a trustee and *cestui que trust*, in reference to the trust fund, are not prohibited, but are watched in this Court with great jealousy, and the trustee is required to show affirmatively, that the dealing was fair and for a reasonable consideration, so as to exclude all suspicion, that any advantage was taken of the influence, which the relation in most cases creates: Boyd v. Hawkins, 17 N. C., 195.

We are also of opinion, that nothing has been done amounting to an election on the part of Mrs. Allen. The deed certainly cannot have that effect. She conveys her interest in general terms, so as to pass the right to one-third of the land, or the right to a support, which was charged on the land: which made election unnecessary.

The plaintiffs are entitled to one-third of the land alloted to them for the life of Mrs. Allen, (she having by the bill made an election to have the land), and to have the negroes surrendered to them, and to an ac-
(282) count of the profits of the third of the land and of the negroes, from the death of William E. Mills; and also to an account of the value of the horses, cattle, sheep, and hogs, at the date of the deed, with interest upon such value from the death of said Mills, up to which time the agreement was acted on, and Mills was entitled to the use of the property, and the increase of the stock.

PER CURIAM. Decree accordingly.

Approved. Paxton *v.* Costin, 45 N. C., 262; McLeod *v.* Bullard, 86 N. C., 210; Threadgill *v.* Commissioners, 116 N. C., 619.

WILEY C. BAILEY vs. E. CARTER & AL.

The time fixed in a statute, as a bar to the redemption, in the case of an express mortgage, specifying a day of forfeiture, must also be applied to a right of redemption, arising by construction of a Court of Equity, and the time must be computed from the accruing of the right to sue.

A Court of Equity can no more disregard a statute of limitation and repose, than a Court of Law can.

Appeal from the Court of Equity of Yancey County, Spring Term, 1851, his Honor Judge Settle presiding.

The bill is for the redemtipon of a slave, Maria. The parties lived in Yancey, and the plaintiff, as a surety for a debt to the original defendant, Carter, conveyed the slave to him by deed, bearing date September 13th, 1841, purporting to be absolute, in consideration (283) of the price of $400. At the same time Carter executed a written agreement to reconvey the slaves, on the payment of the $400, with interest thereon from date, on or before the 1st day of January next following. Carter took the slave into possession, and, on the 2d day of November, 1843, the plaintiff gave up to him the agreement to reconvey, or defeasance, with a written endorsement from the plaintiff, assigning it to Carter, "for value received." The bill was filed in April 1847, and alleges, that the debt to Carter was not $400, but only $150 originally; and that Carter was Sheriff of the county, and had in his hands several executions against the plaintiff's property, and availed himself of the power he thereby had over the plaintiff, to obtain from him the surrender of the defeasance, without any consideration therefor, although the slave was of the value of $500, or more.

Carter answered, that on the 13th of September, 1841, the plaintiff owed him the full sum of $400, for debts previously or then contracted, and that the value of the slave was not then more than that. That the plaintiff made frequent efforts to sell her to other persons up to November, 1843, and could not get more for her; and that, finding he could not, the plaintiff then proposed to sell her absolutely to the defendant, and that, in or-

der to close the business, and obtain an indefeasible title, he and the plaintiff agreed for the equity of redemption at the price of $25.50, and thereupon, the plaintiff surrendered the defeasance, which was intended as an extinguishment of the rights to redeem. The answer states, that the defendant had, ever since, held and claimed the slave as his own absolute property, and without any claim on the part of the plaintiff of any right of redemption; and, thereupon, it insists on the lapse of time, and on the Act of Assembly, limiting the time, &c.

J. W. Woodfin, for the plaintiff.
N. W. Woodfin and *Gaither*, for the defendants.

RUFFIN, C. J. There are two statutes making (284) the laches of a mortgagor a bar to redemption. One was passed in 1826, and enacts, that the presumption of the abandonment of the right of redemption on mortgages generally, shall arise from the lapse of ten years after the forfeiture of the mortgage, or last payment on it. That forms the 14th sec. of Rev. Stat., chap. 65, and has no application in this case. The other is the act of 1830, and forms the 17th section of the same Rev. Stat.; and it enacts, that, when a mortgagor of personal property shall fail to perform the conditions of the mortgage for the space of two years from the time of performance specified in it, or shall omit for that period after the forfeiture of the mortgage, to file a bill claiming the equitable right to redeem, such mortgagor shall be forever barred of all claim in equity to such personal property. The period of two years seems to be short, and, it may be feared, will not unfrequently operate severely on the necessitous people, who are compelled to mortgage slaves. But, as the enactment stands, it concludes the plaintiff's case, which is within its letter. It was argued on his behalf, that the case was taken out of the act by the subsequent dealings, whereby Carter obtained a surrender of the defeasance, and, in effect, a release of the equity of redemption, by undue means, and without any consideration: consti-

tuting fraud and oppression on the plaintiff, amounting to a new and substantive ground of relief. It is not necessary to consider the proofs as to the consideration for the surrender, and the circumstances under which it was obtained; because, allowing the facts to be as alleged by the plaintiff, the relief, in respect thereof, would be simply to put that transaction out of the plaintiff's way, as being, in itself, a bar to the redemtipon, to which he had an equity, according to the terms of the original mortgage, and leave him to insist on that equity, if done in due time—that is, within two years from the 1st of January, 1842. It may be, that the dealing for the equity of redemption in Novem-
(285) ber, 1843, was such a recognition of it, as would authorize the time to be computed from that period. Whether that be so, or not, it is now to be decided; for, supposing the affirmative, the bill would still be barred, since it was not filed for upwards of three years after that dealing. For, undoubtedly, the time fixed in the statute as a bar to redemption, in the case of an express mortgage, specifying a day of forfeiture, is also to be applied to a right of redemption, arising by construction of a Court of Equity, and the time must be computed from the accruing of the right to sue. The Court of Equity can no more disregard a statute of limitation and repose, than a Court of Law can.

PER CURIAM. Bill dismissed with costs.

Approved. Kea *v.* Council, 55 N. C., 345; Colvard *v.* Waugh, 56 N. C., 335.

(286)

LEWIS CHAMBERS vs. LEBO MASSEY.

A. made a parol contract for the purchase of land from B., for which he paid by delivering a horse, and also a bond on one M., which he caused to be made payable to B. M. died insolvent, the bond remaining uncollected. *Held*, on a bill for specific performance or compensation, to which B. pleaded the Statute against parol contracts for land, that A. was entitled to compensation: that so far as related to the horse, if that had been the only subject of controversy, A. would have had no claim to relief in Equity, as he could have had complete redress at law, upon the recision of the contract; but as he had no legal redress as to the bond, the Court would entertain jurisdiction as to that matter; and, thus taking jurisdiction as to part of the case, would take jurisdiction as to the whole and grant the relief prayed for.

The cases of *Ellis* v. *Ellis*, 16 N. C., 341, 398, and *Albea* v. *Griffin*, 22 N. C., 9, cited and approved.

Appeal from the Court of Equity of Haywood County, Spring Term, 1851, his Honor Judge Settle presiding.

The parties made a parol contract in March, 1848, whereby the defendant agreed to convey to the plaintiff in fee seventy-three acres of land for the price of $250, and then put him into possession. The defendant at the same time received from the plaintiff a horse at the price of fifty dollars. The bill was filed in February, 1850, and states, that, by the agreement, the residue of the purchase money was to be satisfied by the plaintiff's transferring to the defendant a claim he had by open account on one John N. McGee, who resided in the same neighborhood with the parties, and whose circumstances were all known to the defendant, and that the defendant was to look to McGee alone for the payment thereof, and without any guaranty from the plaintiff: That the plaintiff accordingly authorized the defendant to receive the debt from McGee and give him an

(287) acquittance therefor, and the defendant accepted McGee and his debtor for the said sum of $200 in full payment of the purchase money for the land, and discharged therefrom; and that he, the defendant, afterwards came to an arrangement with McGee, whereon the defendant agreed to indulge McGee further, and took McGee's bond in March, 1849, for $200, payable to himself. That at the time of the contract McGee, though

somewhat indebted, had considerable property in his possession, and could have been compelled by suit to pay the debt; but that, the giving his bond to the defendant, McGee died insolvent, whereby the debt has been wholly lost. That the contract between the parties was further, that the defendant should make a deed to the plaintiff, whenever he should be requested; and that, in faith thereof and inasmuch as he had thus fully paid the price of the land, the plaintiff, after being let into possession, made extensive improvements on the premises, and requested the defendant to convey them to him—which the defendant refused, upon the pretense that he was not to make the conveyance until all the purchase money should be paid, and that the same had not been paid, inasmuch as he did not accept McGee's debt in satisfaction of the residue of the purchase money, but agreed only to take it as a further security, so as to give the plaintiff credit for such sums as McGee might pay him thereon; all of which pretenses are false. The prayer is for a decree for a specific performance by a conveyance, or, if by reason of the agreement not being in writing, the plaintiff cannot have that relief, that the defendant be compelled to account for the value of the horse and the amount of McGee's debt, so passed by the plaintiff in the payment, and also satisfy the plaintiff for the value of his improvements.

The answer admits the agreement for the sale of the land at the price of $250, and that the defendant let the plaintiff into immediate possession, and receive in part payment a mare at the price of $50. But it de-
(288) nies, that the contract was in other respects as stated in the bill. And it states, that the agreement was not, that the defendant would make a conveyance whenever requested, but it was, that he might retain the title, as a security for the residue of the purchase money, and he was not to convey, until the whole thereof should be satisfied by negotiable notes made by solvent persons in Haywood County. And further, that the defendant did not agree to take the plaintiff's claim on McGee for $200, in payment of any part of the purchase money, but that when the plaintiff

proposed to transfer the claim to him, he, the defendant, positively refused to accept the same as a payment, upon the ground that McGee was insolvent, and so he distinctly informed the plaintiff. The answer denies that the defendant accepted the claim on McGee at all, while it was due on open account, or ever took a bond therefor from McGee; and it states, that when the defendant refused to take the claim, as just mentioned, the plaintiff informed him, that McGee had promised to pay him negotiable notes on the other solvent persons in that county, and proposed to transfer them to the defendant, when they should be received; and the defendant agreed that he would accept such notes, when offered. It is further stated, that the defendant frequently urged the plaintiff to come to a settlement with McGee and get good notes from him and settle with the defendant for the residue of the purchase money, and the plaitiff promised to do so; but, instead thereof, that the plaintiff on the 26th of December, 1848, took from McGee his bond for $200, payable to the defendant on the 1st of March, 1849, (which is exhibited), and offered that to the defendant in payment, and the defendant refused to accept it. That thereupon the plaintiff represented to him that McGee had the notes of other persons, which he would give in place of his own, and thereby prevailed on the defendant to take the note for $200 into his possession, and make the exchange with McGee. The answer (289) avers, that the defendant took the bond of McGee for the purpose of endeavoring to get other good notes from him, which, if obtained, he would be willing to take in payment, and for no other purpose whatever; and that, after the bond fell due, he applied to McGee for such notes, but was unable to obtain any, as McGee had become insolvent; and he then offered to return McGee's bond to the plaintiff, having never made any other use of it or claimed it as his own. The answer then insists, as there was no memorandum in writing, signed, &c. of the agreement, on the benefit of the Statute making void parol contracts for the sale of land, as if the same were pleaded.

J. W. Woodfin, for the plaintiff.
J. Baxter, for the defendants.

RUFFIN, C. J. The case of Ellis v. Ellis, when before the Court on the re-hearing, and the motion for further directions, 16 N. C., 341 and 398, and that of Albea v. Griffin, 22 N. C., 9, dispose of all the points in the present case. As a bill for specific performance, it cannot be sustained, and to that extent it must be dismissed, as the defendant insists on reaffirming the contract, under the statute of frauds. In ordinary cases, the same disposition would be made of it, in its alternative aspect of having the alleged payments on account of the purchase money decreed back. As the contract is disaffirmed and void, the plaintiff might, as a matter of course, recover money on it in an action for money had he received, and also recover the horse in trover after a demand; and, as there would be full remedy at law, this Court would not interfere. But, as in Ellis v. Ellis, the jurisdiction to grant the alternative relief arises, in this case, from the peculiar circumstances, which define the extent of the plaintiff's right, and prevent him from having any remedy at law, in respect of a principal part of the claim, that he may justly set up;
(290) that is, for the bond of McGee. That was given for a debt from McGee to the plaintiff; but, upon the supposition that it would answer the defendant's purpose, and not foreseeing the state of things subsequently happening, it was taken by the plaintiff, payable to the defendant—so that, in respect of that bond, on which, as both sides states, nothing has been received, the defendant has no legal remedy, and, consequently, must be entitled to relief here. That relief, the plaintiff insists, should be by a decree for the nominal amount of the bond, because the defendant took it as money, and is bound to account for it as money, and because McGee was able to pay it when it fell due, and the defendant made it his own by his laches, in not taking the proper means of enforcing payment. On these points the parties are at issue, and each has taken proofs. When read on the hearing, it did not seem, that the

plaintiff had, by any means, satisfactorily established the facts, in either aspect, as alleged by him. But the Court does not consider the proofs at all; for, supposing proofs admissible on this part of the case, after the denial in the answer of the contract, as set forth in the bill; and supposing the proofs to establish the allegation of the bill, respecting McGee's debts and solvency, still the plaintiff could not, upon either ground, have a decree against the defendant, for money in respect of that bond, when the defendant never received any, but the decree must be only for the bond itself, with a special endorsement, without recourse to the defendant. If the defendant should refuse obedience to the decree, that might lay the foundation for holding him liable to make compensation in money for the bond. But that is not to be anticipated, as the answer states, that the defendant never claimed it as his own, and had offered to return it, and he brings it into Court for the plaintiff. The bond is all the defendant got from the plaintiff, and that is all the plaintiff can ask back. It was his folly not to take a deed after, as he alleges, paying for the land, or not to make the contract in an (291) obligatory form, and to leave to the defendant the office of collecting the money from McGee, instead of attending to it himself; and, in the state in which the thing is now brought, he can in equity only get from the defendant the thing the latter received from him. As the plaintiff is entitled to that equity, so as thereby to confer a jurisdiction of a part of the transaction, it is proper the decree should embrace the whole, although in respect of other parts, the plaintiff might have a remedy at law. The plaintiff's equity, then, is to have the bond of McGee, and for payment of the value of the mare received by the defendant with interest thereon, and also the value of the permanent improvements made by him on the premises, before filing the bill, or before he was informed, at any time prior to the filing of the bill, that the defendant would not convey the premises to him under the contract—the plaintiff allowing, or paying to the defendant, such reasonable rents or profits as the plaintiff hath derived from the

premises, or as they were worth since the plaintiff took possession, and delivering possession of the premises to the defendant. Unless the parties should agree on those points, there must be a reference to the Clerk, to make those enquiries, and ascertain the balance due from the one party to the other As it is manifest that the real controversy in the cause was upon the question, who was to bear the loss of McGee's debt, and that has been decided against the plaintiff, he must pay the costs up to this time.

PER CURIAM. Ordered accordingly.

Approved. McCracken *v.* McCracken, 88 N. C., 272; Pendleton *v.* Dalton, 92 N. C., 185; Tueker *v.* Markland, 101 N. C., 422.

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(292)

ROBERT CHAPMAN vs. JACOB MULL.

The principles in relation to dealings between trustee and *cestui que trust*, as adopted by Courts of Equity, do not apply to the case of mortgagor and mortgagee. Dependance and the duty of protection are not involved in this relation, and they may deal, subject only to the ordinary principles; with this difference, that the relation is a circumstance, which always creates suspicion, and aids in the proof of an allegation of oppression and undue advantage, when there is a gross inadequacy of price, and other circumstances tending to show fraud.

Appeal from the Court of Equity of Burke County, Spring Term, 1851, Judge Settle presiding.

Gaither and *E. P. Jones*, for the plaintiff.
T. R. Caldwell and *N. W. Woodfin*, for the defendant.

PEARSON, J. In February, 1848, the plaintiff borrowed of one Hull the sum of $160, for which he executed his note, with the defendant as surety; and to indemnify him, executed a deed, conveying to him several tracts of land. The deed was absolute on its face, but there was a parol agreement, that it should be void, provided the plaintiff paid off the note to Hull, or other

wise released the defendant from the suretyship. In March, 1849, the defendant notified the plaintiff, that he should insist upon being discharged from his suretyship, and the plaintiff endeavored to make sale of the land, with a view to pay off the note to Hull. He did not succeed in effecting a sale, except a small portion, which he contracted to sell to one York. About the 1st of April it was agreed between the plaintiff and defendant, that the defendant should purchase all the land, except fifty acres, at the price of $269, and should discharge the note to Hull in part payment. Ac-
(293) cordingly, on the 13th of April, the parties met at the house of the plaintiff, and a deed was executed by him for the land, as before agreed on, and the defendant paid the price by handing to the plaintiff several notes, which he held on him, and a receipt for an open account, and by agreeing to pay the note to Hull; and the defendant took immediate possession of a small mill situate on the premises, and agreed to let the plaintiff keep possession of the residue, until he gathered his crops.

In August, 1849, the plaintiff paid to Hull the principal and interest of the note, and offered to hand back to the defendant the notes which he had received of him, and to pay the open account, and demanded a reconveyance, which was refused.

The plaintiff charges, that the deed of the 13th of April, 1849, was obtained from him by fraud. That he was in distressed and needy circumstances, and the defendant, taking advantage of his condition, and of the fact that he held a deed for his land, which was absolute on its face, and falsely representing that Hull was about to sue and force the collection of the note, by surprise and circumvention, procured the plaintiff to execute the said deed. The prayer is for an account of the profits, and a reconveyance.

The defendant denies that there was any fraud and circumvention. He avers, that he very reluctantly consented to become the surety of the plaintiff, and did so upon the express understanding, that he was not to continue bound longer than twelve months. That, after

the expiration of that time, finding that the plaintiff was not going to move in the matter, he went to him and insisted upon being discharged, and told him, that for that purpose he must sell the land or a part of it; and upon the plaintiff's replying, that he would not be able to sell, he told him he would take the land, himself, at a fair price, rather than continue bound. He avers, that he at all times admitted that the first deed was but a mere security; and that the price he
(294) paid for the land was a fair one, and more than he could get from any one else; and his reason for giving it was, not because he wanted to buy, but because he was determined not to stand bound as surety longer than he had at first agreed to do. He admits that the plaintiff paid off the note to Hull, but he says he had before informed Hull that he was to pay the note, and they had agreed to meet and have a settlement; and he refused to reconvey, because he had put valuable repairs on the mill. He avers his readiness to pay to the plaintiff the amount paid by him to Hull.

The plaintiff has failed to prove his allegations. He makes no allegation as to the value of the land; but we are satisfied it was not worth more than $250 or $300, and the price paid was a fair one. There was no secrecy and no haste in concluding the transaction. The defendant always admitted, that the first deed was intended as a security, and the plaintiff had time and a fair opportunity to sell to any other person, if he had been able to get a better price.

The bill seems to have been filed under a misapprehension of the application of a principle of equity. Where there is the relation of attorney and client, guardian and ward, trustee and *cestui que trust*, although dealing in respect to the fund is not prohibited in this Court, yet it is watched with much jealousy, and the attorney, guardian, or trustee is required to show affirmatively, that such dealing was fair, and for a reasonable consideration; so as to exclude the inference, that advantage was taken of the relation existing between the parties—that of dependence on the one side, and a duty

to protect on the other. In these cases the principle is adopted, not because there is fraud, but because there may be fraud.

This principle does not apply to the relation of mortgagor and mortgagee. Dependence and the duty of protection are not involved in the relation. The parties have definite rights, stand at "arm's length," (295) and may deal, subject only to the ordinary principle; with this difference—the relation is always a circumstance which creates suspicion, and aids in the proof of an allegation of oppression and undue advantage, where there is a gross inadequacy of price, and other circumstances tending to show fraud.

We are inclined to the opinion, that the principle, as between trustee and *cestui que trust*, may be applicable to a case, when the conveyance is absolute on its face, and the fact of its being a mere security, rests on parol proof, and is controverted: because, in such case, the one party is in the power of the other, and has not the ability of selling, so as to discharge the incumbrance. But it is not necessary now to decide the point; for, in this case, the defendant at all times admitted, that the first deed was a mere security, and the plaintiff had time and opportunity of making sale, and was not at all embarrassed by the fact, that it was absolute on its face.

The bill must be dismissed with costs, upon the defendant's paying into the Court the amount of the note to Hull, with interest thereon, for the use of the plaintiff, as the defendant admits to do.

PER CURIAM. Decree accordingly.

Questioned in Lea *v.* Pearce, 68 N. C., 76, and *Overruled* in Whitehead *v.* Hellen, 76 N. C., 99, in both instances without citing this case, and the overruling case was approved in McLeod *v.* Bullard, 84 N. C., 515; S. C., 86 N. C., 210.

(296)

HENRY R. LEHMAN vs. MARY ANN LOGAN & AL.

The fears and apprehensions of a remainder man, that property in the hands of a tenant for life will be destroyed or carried out of the State, are no sufficient grounds, upon which to grant a sequestration or *ne exeat:* but the facts must be set forth, to enable the Court to see that those fears and apprehensions are well founded.

Appeal from the Court of Equity of Surry County, Spring Term, 1851.

The bill is filed for an injunction and sequestration, and states, that John Logan died about the year 1835, and by his last will devised the whole of his estate, real and personal, after the payment of his debts, to his wife Mary Ann Logan, the defendant, during her life, and, after her death, to be divided as therein directed; except one-half, which was to be at her absolute disposal. Mrs. Logan was left sole executrix, and took into her possession the whole property, and is still so possessed. The bill alleges, that she is old and infirm of mind, incaple of managing the estate, and that it has been greatly wasted; and the plaintiff fears, that, if she lives much longer, little of it will remain to those, who will succeed to her; that the slaves have been so little kept in order, that they have become idle and drunken; "and that there is great danger, that the said slaves will not be forthcoming at the death of said Mary Ann." The bill expressly admits, that the defendant is *non compos mentis.* The plaintiff is the assignee, as he alleges, of one of the interests in remainder. Upon this bill an injunction and sequestration were granted. The answer admits the charge, that the defendant is very old, but denies, that the estate has been wasted and is now less valuable than when she received it. Upon the coming in of the answer, upon argument, the sequestration was removed; and from this interlocutory order, the plaintiff appealed.

(297) *H. C. Jones*, for tne plaintiff.
Boyden, for the defendant.

NASH, J. We entirely concur with the Court below. The bill lays no foundation for the relief asked. It has been repeatedly decided, that the fears and apprehensions of a remainder man, that property in the hands of a tenant for life will be destroyed or carried out of the State, are no sufficient grounds, upon which to grant a sequestration or *ne exeat;* but that the facts must be set forth, to enable the Court to see that they are well founded. The only ground stated here is, that the defendant is a very aged lady, and labors, no doubt, under many of the infirmities incident to others at the time of life, and she stoutly denies, she labors under more. It is to be remarked too that none of the other claimants in remainder complain, or say, that they fear a destruction or wasting of the property. They are content to risk their interests, until, in the course of nature, they shall come into its possession; and the plaintiff must be content, so far as this case is concerned, to bide his time. We see no reason for depriving the defendant of the possession of the property, which the affection and bounty of her husband have secured to her.

There is no error in the interlocutory order appealed from, which is hereby affirmed; and the plaintiff must pay the costs of this Court.

This opinion will be certified to the Court of Equity for Surry County.

PER CURIAM. Ordered accordingly.

(298)

JOHN J. AND WILLIAM A. HALES BY GUARD'N vs. JOHN K. HARRISON.

Where a tenant for life sold a negro, who was taken out of the State to parts unknown and sold by the purchaser; *Held*, that after the death of the tenant for life, the remainder men, though they might have recovered damages at law without showing notice, yet, having shown notice, they fix the purchaser with fraud, and, upon that ground, are entitled to recover in a Court of Equity the amount for which the negro sold, with interest, deducting an allowance for expenses, commissions, &c.

Whether a Court of Equity would not have had jurisdiction in such a case, without showing notice, *Quære.*

The case of *Cheshire* v. *Cheshire*, 37 N. C., 569, cited and approved.

Appeal from the Court of Equity of Union County, Spring Term, 1851, his Honor Judge Battle presiding.

The facts of this case are set forth in the opinion of the Court.

Alexander, *Osborne* and *Hutchison*, for the plaintiff.
Wilson, for the defendant.

PEARSON, J. The plaintiffs were entitle to the reversionary interest in a negro boy, after the death of their mother. She married one Griffice, and took the boy into possession, and in 1838, sold him to the defendant, for the price of $580, who soon thereafter carried him out of the State to parts unknown, and sold him at an advance of $85. Mrs. Griffice died in March, 1844.

The plaintiffs allege, that the defendant had notice of their right, and they pray that he may discover the amount for which he sold the negro, and account therefor.

The defendants denies that he had notice, and avers that the advance in the price was not more than enough to pay his expenses, and a reasonable advance for his commissions and risk.

We are satisfied the defendant had notice.

(299) It was insisted, that the plaintiffs had a remedy at law by a special action on the case, and this Court ought not to take jurisdiction. It is true, the

plaintiffs might have recovered damages at law, without showing notice. But, by showing notice, they fix the defendant with a fraud; and, as he carried the negro to parts unknown, they have a right to follow the fraud, to call for a discovery, and to hold him to account for the sum which he received. We give no opinion as to the necessity of proving notice, in order to give this Court jurisdiction.

This was decided in Cheshire v. Cheshire, 37 N. C., 69. It was held in that case, that the defendant, if harged with the sum, for which the slave sold, had a right to an allowance for expenses, commissions, &c. The defendant says, these items will about equal the advance in the price. Assuming this to be true, the plaintiffs are entitled to a decree for the sum of $580, with interest from the death of Mrs. Griffice, March, 1844.

The defendant must pay the costs.

PER CURIAM. Decree accordingly.

Approved. Sanderford *v.* Moore, 54 N. C., 206.

INDEX.

ADVANCEMENTS :

1. Where a father put into the possession of his son a slave, not as an advancement, but expressly as a loan, and the slave remained several years in the possession of the son, without any claim on the part of the father, and then the slave died, and afterwards the father died intestate; *Held*, that the slave was not an advancement, but the value of the hire of the slave, while in the son's possession, was an advancement. *Hanner* v. *Winburn*, 142.
2. A father sold to one of his sons a tract of land and took his bonds for the purchase money. Afterwards he surrendered one of the bonds to his son, and then died intestate; *Held*, that the amount of the bond so surrendered was an advancement to his son. *Ibid.*
3. In the case of advancements, interest should not be calculated on them from the time of the intestate's death; as the administrator is not chargeable with interest on the assets, until two years after that period. *Ibid.*
4. Where an advancement of a slave has been made to a son by a father, who died intestate, and the slave dies in the lifetime of the father, the son shall be charged with the valuation of the negro, as a part of his advancement in the distribution of the intestate's estate. If slaves advanced increase, the child has the benefit; if a loss happens, it falls on the child. *Walton* v. *Walton*, 138.
5. A. died intestate, in 1848, leaving a widow and six children surviving him, to-wit: John, Susan, Rachel, Temperance, Elizabeth and Dolly. Three other children died in his lifetime, Sarah, Mary and Rebecca, each of whom left children surviving the intestate. The intestate in his lifetime gave and conveyed to John two slaves, and a tract of land in fee. The slaves were of less value than one tenth part of his personal estate; but they and the land together exceeded one-ninth of the whole estate, real and personal. The intestate also by deed conveyed certain slaves to his daughters. He also put other slaves without conveying them in possession of his three daughters, who afterwards died in his lifetime, and after their death conveyed them to his daughters' children respectively. There is a surplus of money and slaves remaining for distribution. *Ibid.*
6. *Held*, first; that the grandchildren, taking in right of their mothers, were not bound to bring into hotchpot the slaves put in possession of, but not conveyed to, their mothers, but conveyed to themselves, but they were bound to bring in those conveyed to their mothers respectively. The statute of distributions is restricted to gifts from a parent to a child, and does not include donations to grandchildren. *Ibid.*
7. *Held*, secondly; that under the act of 1844, ch. 51, in the distribution of the personal estate of an intestate among his children or those who represent them, advancements, made to one of the children, of real as well as of personal property, are to be brought by such child into hotchpot, even where

the intestate has not died seized of any real estate; and that in this case, John, having received in real or personal property more in value than his share of the personal estate remaining for distribution, is entitled to claim nothing more. *Ibid.*

8. *Held*, thirdly; that though the widow is entitled to the benefit of advancements of personalty, made to the children; yet she is not entitled to any benefit from advancements of real property, but, in estimating her distributive share, advancements of personalty are alone to be reckoned. *Ibid.*
9. *Held*, therefore, that, in this case, the widow's share is to be first ascertained, upon the basis of a division of the person alty, by itself (including partial advancements) between her and all the children, under the act of 1784; and after taking out her share, the remaining fund is divisible among the other eight children or such of them as were not fully advanced, and their representatives. *Ibid.*

ARBITRATION AND AWARD.

1. The object of a submission to an arbitration, is to put an end to litigation, and therefore, the award must be final; and if it is not final, and thus the objects of the arbitration not completely answered, the consideration of the agreement fails, and either party may insist upon setting it aside, and claim the right to stand in *statu quo*. *Patton* v. *Baird*, 255.
2. Where the arbitration is a rule of Court, there is a further reason, that, unless the award be final, the Court cannot enforce it. In this State, judgments are entered upon such awards, and the parties are then out of Court. *Ibid.*
3. After the award has been made, the arbitrators are *functi officio*, and have no more power to alter it than a jury have to change their verdict after it is rendered and they discharged. Ibid.
4. Arbitrators are no more bound to go into particulars, and assign reasons for their award, than a jury are for their verdict. Their duty is best discharged by a simple announcement of the result of their investigations. *Ibid.*

BILL AND ANSWER:

1. The plaintiff in equity must, to entitle himself to a decree, sustain his own allegations. It will not be sufficient for him to rely upon any equity disclosed in the answer, other than that alleged in his bill. *Melvin* v. *Robinson*, 80.
2. The Court does not favor the "splitting up of suits" unless there are several persons having distinct rights, and prejudice may result from the fact of the investigation being made too complicated. And where the plaintiff's rights stand upon the same footing, and the matters charged constitute in fact but one transaction, he may unite them all in one bill. *Rasberry* v. *Jones*, 146.
3. Where a person files a bill to set aside an usurious contract, he must submit to have the whole agreement annulled and to be restored to his original condition. Therefore he cannot claim to be relieved from the usury, and at the same time to be benefitted by the extension of credit for which the usurious interest was stipulated. *Ibid.*

BILL TO PERPETUATE TESTIMONY:

1. One cannot be allowed to call for the title papers of another, under whom he sets up no title nor interest in himself, except that he may, possibly, at some time find it convenient to use them in an action at law, as evidence against those having them in possession, upon a collateral matter. *Baxter* v. *Farmer*, 239.
2. Bills to perpetuate testimony only lie, when the evidence relates to legal rights, which cannot be tried immediately, by reason of the impediment of a prior legal title, outstanding in the defendant or some one else. *Ibid.*

BONDS AND NOTES:

When a note or bond is assigned, after it becomes due, the assignee, though for valuable consideration, and without notice, holds it subject to all the equities, which the debtor has against the assignor. *Mosteller* v. *Bost*, 39.

CONTRACTS:

1. Equity never gives relief upon an executed contract except on the ground of accident, mistake or fraud. *Murray* v. *King*, 19.
2. Where the *feme* plaintiff had conveyed her estate in dower to the defendant and he had covenanted, in consideration thereof, to support her; *Held*, that if he failed to do so, she could not set aside the whole contract, but must resort to her remedy at law for damages. *Ibid.*
3. Where A. claimed title to a slave as a legatee, and one of the other legatees conveyed certain other slaves to A. in consideration that he would suffer the slave claimed by him to be sold as a part of the fund for distribution, and it turned out that A. was not in fact entitled to such slave, the agreement that the slave should be so sold did not form a valuable and sufficient consideration for the slaves conveyed by the other legatees. *Motley* v. *Motley*, 211.

CREDITORS:

Equity never interfers to aid one creditor against another, on the ground of mistake. *Knight* v. *Bunn*, 77.

DEEDS:

1. Where a bond has been given for the conveyance of land, and the administrator of the obligor, after his death, executes a deed for the land, by virtue of our Statute, any equitable defense against the bond may be set up against the deed, which rests upon the bond. *McGraw* v. *Gwin*, 55.
2. Where a deed is assailed on the ground of fraud and the allegation is not made good, plaintiffs are not in general allowed to fall back upon any secondary equity; and they are never allowed to do so unless such secondary equity is distinctly set out in the bill and relied on as an alternative, so as to give to the defendant full notice, and an opportunity to meet the bill in both its aspects. *Ibid.*

DEVISES AND LEGACIES:

1. A testator devised to his son A. a certain tract of land, and to his son W. another tract, and directed that A. should

erect on W.'s land a dwelling house, within ten years from the date of the will, and, to enable him to do so, lent A. the use of a negro man and a wagon and four horses for ten years. At the end of the ten years the house had been commenced, but was not finished, and what had been done was not in a workmanlike manner: *Held*, that W. was not entitled to recover from A. the hire or profits of the negro and wagon and horses, but that he was entitled to recover such a sum as would be sufficient to enable him to finish the house in a workmanlike manner. *Brown* v. *Brown*, 30.

2. A testatrix, in one clause of her will, devised as follows: "I will that all the balance of my property, not herein disposed of, be sold by my executor, and after my debts paid, the proceeds of the sale to be divided into three divisions, one to A., one to B., and the third to be held by my executors for my negroes," &c. By another clause she had directed her negroes to be emancipated; and it had been decided that the negroes and the fund given to them did not pass by the will, but fell into the residue: it was now held that these negroes, and the property bequeathed to them, constituted the primary fund for the payment of debts. *Kirkpatrick* v. *Rogers*, 44.

3. It is the general rule, that independent of any intention of the testator, and without any particular charge on it, the law throws the burthen of paying the debts on property, as to which there is no intestacy, unless there be an exception of it, or charge of the debt, &c., be fixed, by plain words or implication, on other property exclusively. *Ibid.*

4. A mere charge of debts on a particular part of the estate will not exonerate a fund, on which there is a prior liability; for the charge may as well be taken, as making that fund auxiliary, as intending to place it in front. *Ibid.*

5. There must be something to change the order, in which, the law says, the different parts of the estate are applicable, when the testator does not direct otherwise. *Ibid.*

6. C., a woman, was entitled to a legacy of a life estate in two-thirds of a certain undivided number of slaves, and sold part of them, and with a part of the proceeds purchased a house and lot. She afterwards married B., who released his interest in the house and lot to the legatee of the other undivided third of the slaves, and received a portion of the amount due for the price of the slaves sold by his wife. B. then conveyed his interest in the "house and lot" to a trustee to secure creditors: *Held*, that, as B. had not elected to take the house and lot as part of his wife's legacy; the deed to the trustee for creditors passed no title, legal or equitable. *Powell* v. *McDonald*, 58.

7. A testator bequeathed to his sons as follows: "I give and bequeath to my sons, A., B., C. and D., and their heirs, 440 acres of land lying, &c., my two negroes, &c., all of which I wish sold, and the proceeds to be equally divided among my said four sons, &c., after my funeral expenses and debts are paid out of the same. *Held*, that the sons did not take such an estate in either the land or the negroes, as was subject to execution or attachment, but they were only entitled to divide the proceeds of the sale of the property, which the ex-

ecutor was directed by the will to make. *McLeran* v. *McKethan*, 70.

8. A testator devised to his son H. several tracts of land, and to his son John several tracts of land, including the home place after the death of his wife. He gave to each of his daughters, E. and M., a negro woman and four children. He gave to his wife absolutely six negroes, and lent to her during her widowhood, four other negroes, and gave her horses, ploughs, cattle, &c., and lent her the home plantation, with the privilege of fire wood and rail timber on any of his lands for the use of the plantation. He then directed as follows: "I will that my negroes all to be hired out in common, except those given to my wife and also loaned to her, and the hire and interest of my notes to go for clothing and educating of my children, and the rest of my lands also." At the time of the testator's death, his son H. had just arrived at age. E. was 14, J. 10, and M. 8 years of age. *Easton* v. *Easton*, 98.

9. *Held*, 1st, That the widow was entitled to the immediate possession of the negroes and the stock, farming utensils, &c., which were bequeathed to her; and also to the immediate possession and use of the home plantation; 2dly, That H., having arrived at age, was entitled to the immediate possession of all the land devised to him, and the one-fifth part of the undisposed of property, leaving the balance as a common fund for the support and education of the three other children, to be applied to that purpose at the discretion of the executor; 3dly, That when M. arrives at age or marries, she will be entitled to draw out of the common fund, the negroes given to her, and one-fifth of the property undisposed of; so, also, J., when he arrives at age, will be entitled to the land devised to him, subject to the life estate of his mother in the home place, and to one-fifth of the undisposed of property; and 4thly, That when M. arrives at age or marries, she will be entitled to the negroes given to her, and one-fifth of the property undisposed of; and the widow will then take the remaining fifth of the property undisposed of. *Ibid.*

10. A gift by will of a negro woman *and her increase* does not include the children born in the lifetime of the testator. *Turnage* v. *Turnage*, 127.

11. A., by one clause of his will, devised as follows: "I leave to J. S. W. the use of the lot and improvements, whereon he now lives, until my son C. arrives at twenty-one years of age, or for four years after my death; then I wish them sold, and the amount divided among, &c., on condition that he, the said J. S. W., will keep them in repair, and assist my wife in the management of the farm and settlement of my estate." In another clause, the testator says, "I hereby nominate and appoint my wife M., and my son C. W. W., executrix and executor to this my last will (C. to qualify when he arrives at twenty-one years of age)." And again the testator says, "I request the favor of my nephew, J. S. W., to attend to and assist my wife in her business, until my son C. becomes capable of doing so, or longer, if necessary, and to employ other counsel and advice, when necessary, for which I wish to compensate him." The will was

made in July, 1846, the testator died in 1848, and his son C. arrived at age in March, 1850. *Held*, that the devise to J. S. W. was only as a compensation for his services until C. arrived at age and qualified as executor, and that J. S. W.'s interest in the house and lot terminated at that period. *Skinner* v. *Wood*, 131.

12. A residue of goods, which are given for life, with a remainder over, ought to be sold by the executor, and the interest on the amount of sales should be paid to the legatee for life, the principal being kept by the executor for the remaindermen. *Jones* v. *Simmons*, 178.

13. When the property is delivered over to the tenant for life and by him wasted or consumed, the remainder men are entitled in equity to recover its value either from the executor of the original testator or from the executor of the tenant for life. *Ibid.*

14. Where two clauses in a will are entirely inconsistent, one with another, the latter must prevail; but, to produce this effect, the two clauses must be entirely inconsistent and incapable of reconciliation. *Baird* v. *Baird*, 265.

15. Where a testator, in one clause of his will, directed that his wife should "have a decent and comfortable support to be derived from all his lands and tenements," and, in a subsequent clause, devised to his son A. in fee simple a part of his lands, and the clause proceeded, "subject, nevertheless, to a charge of five hundred dollars, to be paid by him, his heirs, &c., to his brother James M. Baird, as soon as he, the said James M. Baird, shall have completed his studies, &c.; a good and sufficient voucher for the payment of the said sum of five hundred dollars, &c., shall vest in him, his heirs or assigns forever, a good, pure and absolute of inheritance in the said lands and tenements; *Held*, that notwithstanding this charge in favor of James R. Baird, the land so devised was also subject to its proportionate share of the charge in favor of the wife. *Ibid.*

16. A testatrix devised as follows: "I give and bequeath to my brother J. the other half of my estate, in trust for the benefit, maintenance and support of my daughter A., provided she becomes a widow and has not a sufficiency for her support, during her life, and, at the time of her death (or should her situation require it) to be equally divided between the children of my daughter, Ann Steptoe, then alive, or their issue, and should either of them die without issue then their part to be equally divided between the survivors or their issue. *Harvey* v. *Smith*, 182.

17. *Held*, that there being no direction for an accumulation, the profits accruing during the coverture of A., belong to the next of kin of the testatrix. *Ibid.*

18. A testator bequeathed as follows: "Thirdly, I desire that all the rest of my negroes may be divided into two equal parts. One-half of said negroes I give and bequeath to my grandchildren," A., B. and C., "to be divided between them as follows, viz: "to be equally divided between" the said A., B. and C." "Fourthly, should either of the said" A., B. and C., "die before arriving at the age of twenty-one

years, unmarried and without leaving a child or children, living at his or her death, I desire that the share of the one so dying shall go and belong to the survivor or survivors of them, and should all" the said A., B. and C., "die before arriving at the age of twenty-one years, unmarried and without leaving a child or children, or the issue of such living at the death of the survivor of them, I then leave the half of the negroes hereby bequeathed to them, to such person or person as may be my next of kin, according to the Statute of distributions." A. attained the age of twenty and married, and then died in the lifetime of the testator, leaving no issue. *Hinton* v. *Lewis*, 184.

19. *Held*, that the share bequeathed to A. did not survive to B. and C., but went to the next of kin to the testator. *Ibid.*

20. A testator, by his will, gave and bequeathed "*to the heirs of* S. G. six hundred dollars." In another clause of his will he gave to A. and B., "sons of W., five hundred dollars each," and, in another clause, to "the *seven children* of G. T. two hundred dollars each." S. G. is still living. *Timberlake* v. *Harris*, 188. *Held*, that the bequest "*to the heirs*" of S. G. was void for vagueness and uncertainty. *Ibid.*

21. A testatrix, by her will, devised as follows: "I desire that, at my decease, after my just debts are paid, my property may be divided as follows: "To the Bible Society, Education, Colonization and Home Missionary Societies, each five hundred dollars." It was admitted by the claimants of the respective legacies, that the Bible and Colonization Societies were not described by their corporate names, though they were well known and called by the names used in the description---and so also as to the two other Societies. *Taylor* v. *American Bible Society*, 201.

22. *Held*, by the Court, that the description not being correct on the face of the will, so as to designate with certainty who were the objects of her bounty, the legacies were void for uncertainty in the description of the of the persons who were to take. *Ibid.*

23. In the same will is the following clause: "As to my slaves, if I could any way effect it, I would emancipate them. I do not wish to entail slavery upon them. G. P. has been promised if ever I sold him to let him have a chance to buy himself. If this can be done, I desire it may, by his paying my estate one hundred dollars." *Held*, that by this clause there is no direction for the emancipation of any of them. *Ibid.*

24. A testator bequeathed and devised to each of his five children a large amount of personal and real estate, "subject to the payment of one hundred dollars," each to A. B., when she should arrive at the age of eighteen. *Held*, that the duty of paying these sums of one hundred dollars to A. B. was not imposed on the executor, but was a trust to be performed by the children respectively. *Phillips* v. *Humphries*, 206

31 When C. D. purchased some of the land and negroes so bequeathed, and with notice, he is liable, in default of the legatees and devisees, to pay to A. B. the proportion of her leg-

acy which the legatees or devisees from whom he purchased were bound to contribute respectively—the legacy of A. B. being a lien on such property. *Ibid.*

EVIDENCE :

1. A deed in trust to secure creditors, thus descibed one of the notes intended to be secured : "A note to John Ricks for about twenty three hundred and fifty dollars, now in possession of D. A. T. Ricks, given several years since, to which Bennett Bunn, B. D. Battle and Robert Ricks are sureties." *Held*, that parol evidence could not be received to show that this description was given by mistake, and that the note intended was as follows: "24,12.26 cents. With interest from the 10th of January, we or either of us promise to pay D. A. T. Ricks, guardian, two thousand four hundred and twelve dollars twenty-six cents, for value received. Witness our hands and seals 18th February, 1849. Redmun Bunn, Bennett Bunn, D. B. Battle." *Knight* v. *Bunn*, 77.
2. Where a deed is attacked on the ground of fraud, it is competent to show, in addition to the consideration expressed, the motives of the grantor in making the deed; such, for instance, as the relationship of the parties or the great degree of affection in the grantor for the grantee. *Potter* v. *Everett*, 152.

EXECUTIONS :

1. In order to pass the title to the interest of a remainder man in personal property, sold under execution, it is necessary that the property should be present at the sale. *Blanton* v. *Morrow*, 47.
2. The sheriff, who has an execution against a remainder man, has a right to seize the property in the possession of the tenant for life and bring it to the place of sale. *Ibid.*

EXECUTORS AND ADMINISTRATORS :

1. If an administrator gives a preference to a creditor who is not entitled to it, he commits a *devastavit*, and is chargeable for the same assets to another, whose debt is of higher dignity, or whose diligence gives him priority; and this, though it may have been done through an honest mistake. And the rule is the same in Equity, in this respect, as at law. *Moore* v. *Albritton*, 62.
2. Where A. and B. were co-sureties on a bond of C., and C. died, and A. administered on his estate; and then B., in a suit against A. as administrator, recovered the amount of a debt due to B. by the principal, A.'s intestate, and fixed him with assets upon the ground that A. had paid the debt to C. voluntarily, while B.'s suit was pending; and A. alleged in a bill of injunction to restrain B. from collecting his judgment, and for contribution, that he had no assets of his intestate out of which he could pay the debt to C., but that he paid the same out of his own funds, which was denied by B. in his answer; *Held*, that the Court could not determine the question of contribution, until an account of the administration of A. should be taken, and for that purpose a reference be had, and the injunction continued over. *Ibid.*

3. Where it is alleged that a note belonging to an estate, has been, fraudulently and in breach of trust, transferred by the executor, there must be an inquiry into the state of the assets; for if a balance was due to the executor to the amount of the note, it was not a fraud in him to appropriate it to the payment of his own debt. *Ward* v. *Turner*, 73.

4. Plaintiffs are not allowed to impeach a *single item* in the administration of assets.

5. It can only be reached by a general account, which will be final, not only as to the item particularly complained of, but as a settlement of a whole subject. *Ibid.*

5. Where there are no debts due from an estate, it is the duty of the executrix to pay the legacies, without waiting for the expiration of the two years from the death of the testator. *Turnage* v. *Turnage*, 127.

6. The statute *allows* two years to executors and administrators to settle estates, upon the supposition that many estates, which are complicated, cannot be settled in less time; but this is intended as an indulgence to them, and was by no means intended to confer on the residuary legatee the right to have the fund put out at interest for his benefit. *Ibid.*

7. A., by his will, bequeathed all his personal property to his widow. He died, leaving surviving him, his widow and eight children, who were born before the making of the will, and one child born afterwards, for whom no provision had been made; *Held*, that the latter was entitled to one-tenth part of the personal estate, though no petition was filed by such child within the time prescribed by the Act of Assembly, the administratrix having herself filed this bill under the provisions of the Act. *Alston* v. *Alston*, 172.

8. It is only through the medium of the personal representative, that Courts will interfere in the administration of a deceased person's estate. Such representative is the proper person to collect in the assets, and be answerable to those who may be entitled to them. *Davidson* v. *Potts*, 272.

Therefore, one portion of the next of kin cannot sue another portion, in matters pertaining to an intestate's estate, without having an administrator as a party. *Ibid.*

And it makes no difference that those who wish to sue reside out of the State, and cannot procure letters of administration. *Ibid.*

9. An administrator may sell or pledge the effects, or discount a note belonging to the estate, and the party who deals with him will get a good title, provided he deal honestly; for the legal title is in the administrator, and the purposes of the estate may require the representative thus to dispose of parts of it. *Wilson* v. *Doster*, 231.

10. But when one gets from the administrator or other person acting in a fiduciary character, the trust fund or a part of it, as payment of the trustee's own debt, that person cannot hold the fund from the *cestui que trust*, any more than the original trustee could; for it is a clear fraud, in violation of the obligations in the trust in one of the parties, and a concurrence in the fraud by the other, and both are equally liable. *Ibid.*

11. The next of kin could recover the assets so disposed of, and the surety of the administrator, who has paid the claim of the next of kin, on account of an administrator becoming insolvent, and having committed a *devastavit*, will be entitled to the same relief they could have had. *Ibid.*

12. An executor has the legal title and the authority in law to sell slaves and other chattels of his testator, and, unless the purchaser knows that the sale was not made for the purposes of the estate, but *mala fide* for the purpose of a *devastavit*, he gets a good title, as well in equity as at law. *Polk* v. *Robinson*, 235.

FEME COVERT :

A *feme covert*, entitled to a separate estate in personal property, unless there be some clause of restraint of her dominion, may convey it and do all other acts in respect to it, in the same manner, as if she were a *feme sole*, whether a trustee be interposed or not. Pearson, J., dissented. *Harris* v. *Harris*, 111.

FRAUD :

1. The plaintiff was a poor, ignorant old man, who had never had a law suit. He was arrested on a groundless charge of conspiracy at a late hour of the night, and having his fears excited by the falsehood and artifice of the defendant's agent, for the purpose of being released, executed a note for a certain sum. *Held*, that this note was procured from him by fraud and duress, and that he was entitled in Equity to have it cancelled. *Meadows* v. *Smith*, 7.

2. It is as much against conscience, to attempt to avail one's self of the iniquity of an agent, after it is known, as if there had been preconcert. *Ibid.*

3. Where a person fraudulently conveys property to another, with the view of defeating his creditors, Equity will not assist him to procure a reconveyance. *Jones* v. *Gorman*, 21.

4. Mere inadequacy of price is no ground for setting aside a contract, unless it be such as amounts to *apparent fraud*, or the situation of the parties be so unequal, as to give one of them an opportunity of making his own terms. In such a case, Equity would not lend its aid to execute the contract; but leave the party seeking it to his remedy at law. *Potter* v. *Everett*, 152.

5. Where a tenant for life sold a negro, who was taken out of the State to parts unknown, and sold by the purchaser: *Held*, that after the death of the tenant for life, the remainder men, though they might have recovered damages at law without showing notice, yet, having shown notice, they fix the purchaser with fraud, and upon that ground are entitled to recover in Equity the amount for which the negro sold, with interest, deducting an allowance for expenses, commissions, &c. *Hales* v. *Harrison*, 298.

6. Whether a Court of Equity would not have jurisdiction in such a case, without showing notice, *Quere*. *Ibid.*

INJUNCTIONS :

1. Injunctions to prevent persons from working a gold mine, to which the plaintiff claims title, are not put upon the same

footing with injunctions to stay executions on judgments at law, where the legal rights of the parties have been adjudicated. *McBrayer* v. *Hardin*, 1.

2. In cases of the former class, where it appears that, if the defendant's allegations be true, the injunction can do them no harm, but, if the plaintiff's allegations be true, he may sustain an irreparable injury, the injunction should be continued to the hearing, that the facts may be investigated. *Ibid.*

3. A Court of Equity will restrain, by injunction, the assignor of an equitable claim from dismissing a suit at law, brought by the assignee in the name of the assignor. *Deaver* v. *Eller*, 24.

4. It has been repeatedly decided, that, on a motion to dissolve an injunction, it must appear that the answer fully meets the plaintiff's equity—it must not be deficient in frankness, candor or precision, nor must it be illusory. *Ibid.*

5. Equity will not enjoin a tenant for life from removing the property, or compel him to give security for its forthcoming, unless good ground be shown that it is in danger of being removed beyond the jurisdiction of the Court. *Clagon* v. *Veasey*, 173.

6. Although, in general, a tenant for life of slaves is entitled to the possession of them, yet it is a settled rule of the Court not to allow them to be removed beyond the jurisdiction of the State. *Cross* v. *Camp*, 193.

7. Hence, when a tenant for life of slaves, living here, threatens to carry them away or to sell them to another, with a view to their removal, a Court of Equity will lay them under injunction and bonds not to remove them, and to have them forthcoming. *Ibid.*

8. A man who is sued in an action of debt, and does not prove, on the trial at law, payments which he alleges he has made, can have no relief in equity, unless he can show some fraud or circumvention practised, to prevent his making the proof. *Deaver* v. *Erwin*, 250.

9. In regard to new matter, introduced by a defendant in his answer to an injunction bill, there is this distinction: Where the bill charges the receipt of money, and a general accountability, and the answer admits the receipt, and seeks to account for the money by alleging its application to some particular purpose, then the injunction will not be dissolved on the answer; but where the bill charges a payment on a particular account, and the answer denies that any payment was made on that account, and accompanies the denial with an admission that a certain sum was received, as a payment on some other account; for there is no confession and avoidance by new matter, but a positive denial of the allegation, together with an explanation of a circumstance, relied on to give color to the allegation. *Ibid.*

10. The fears and apprehensions of a remainder man, that the property in the hands of a tenant for life, will be destroyed or carried out of the State, are no sufficient grounds upon which to grant a sequestration or *ne exeat;* but the facts must be set forth, to enable the Court to see that those fears and apprehensions are well founded. *Lehman* v. *Logan*, 296.

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LIMITATIONS, STATUTE OF :

A Court of Equity can no more disregard a statute of limitation and repose than a Court of Law can. *Bailey* v. *Carter*, 282.

MARRIAGE AGREEMENTS :

1. Where an agreement in contemplation of marriage between A. and B. the intended wife, (no trustee being interposed), it was stipulated that B. "shall have and hold (her property) the land, negroes, &c., to the only use and benefit of the said B., her executors and assigns forever." *Held*, that these words cannot be considered as amounting to a gift to her *next of kin*. *Hooks* v. *Lee*, 83.

2. "Executors and administrators," taken as words of purchase, cannot mean "next of kin." *Ibid.*

3. If there were nothing more in the deed, it would be held clearly, that B., taking an absolute estate and dying without making any disposition thereof, the personal estate would pass according to law, to her husband as her administrator, or to such person as might administer for her husband. *Iaid.*

4. But where, in the same deed or agreement, it was further stipulated, "That I, the said A., do hereby assign, sell, deliver, alien and confirm, and have by these presents sold, aliened, assigned, delivered and confirmed to the said B., all the right, title, estate, interest and benefit, which I may by law acquire, derive or receive, either in law or equity, in and to the (*said*) real and personal estate, belonging to the said B., by reason of the said intermarriage:" it was *Held*, that A. had thereby renounced and given up all right which he would otherwise have been entitled to, either in law or equity, after the death of his wife, as her husband, and of course could claim none of the property, so secured, in that capacity. *Ibid.*

5. It was held, further that this construction was not varied by the insertion, in the clause covenanting for further assurance, of the words "entirely to divest himself of right, title and estate, in and to the land and negroes, &c., so that he nor his creditors shall have any right to sell or contract the same. *Ibid.*

6. By marriage articles it was stipulated that all the "right, title and interest of the property, now belonging to S., (the intended wife) shall not be changed or so altered, as to become subject to the control of J., (the intended husband), as respects being subject to the payment of any debts of the said J., which he may now owe, or may hereafter contract in any way whatever, or be subject or liable to be sold by the said J., to his use and benefit, without the consent of the said S. Nevertheless, the said J. has full power and authority to and the property of the said S., at all times in such manner as shall be most condusive to the said S., and that a reasonable portion of the property as aforesaid shall be made use of by the said J., for the better support of the said S." *Held*, that the wife had no power by virtue of these marriage articles, to dispose of the property by will. *Jones* v. *Hurst*, 134.

MORTGAGES :

1. A mortgagor who has not paid the amount of the money loaned on the mortgage and admitted to be due, nor brought it into Court, cannot enjoin the mortgagee from collecting the amount due, nor from recovering in ejectment the mortgaged premises, although the plaintiff alleges that the contract was usurious. *Cunningham* v. *Davis*, 5.

2. A deed, absolute on its face, may be converted into a mere security for money lent, by an allegation that such was the intention, and that the condition was omitted by mistake or surprise, or by the fraud or oppression of the party who procured its execution, provided the allegation is clearly established by parol evidence, of admissions and declarations of the party, aided and confirmed by facts and circumstances. *Sellers* v. *Stalcup*, 13.

3. Where, in a case of that kind, the admissions of the party were proved, and his answer to the bill filed against him was unfair and equivocal, and where it was also proved that the sum paid was grossly inadequate as a consideration for an absolute sale—that the plaintiff was in need of money, and was in the power of the defendant, who held executions against him—and that the plaintiff retained possession for some short time, made a contract to sell the land, and put a tenant in possession to hold for him, who did so, until the defendant expelled him; *Held*, that under these circumstances, the deed should be held merely as a security for the money actually advanced. *Ibid.*

4. Where it was complained that a deed, which appeared on its face to be for an absolute sale of land, was, in reality, intended as a mere security for money loaned or advanced, it was held by the Court, that the following facts established by the proofs, were entirely inconsistent with the fact of an absolute sale, and showed that the conveyance could only have been intended as a mortgage; 1st, that the consideration expressed, was less than one-third the value of the land; and the grantor could then have sold it for the value; 2dly, under the same arrangement, under which the land was conveyed, and about the same time, the grantor took a bill of sale, absolute on its face, for some perishable property, as corn, &c., and it is admitted this was only security for the loan of money; 3dly, the grantor remained in possession of the land for nearly two years before it was claimed by the grantee, without any charge of rent; 4thly, the sum paid on the mortgage of the perishable estate exceeded the amount due on that mortgage; 5th, the precise and peculiar fraction in the sum alleged as the value of the land, and the purchase money, $31.40. *Kemp* v. *Earp*, 167.

5. A. executed a mortgage to B., to secure the payment of a certain debt due from A. to B., and also transferred to B., without endorsement, four notes on a third person. B., at the same time, executed a deed, in which it was stipulated that "B. should not call on A., or hold him liable, until the insolvency or inability to pay of the obligors is ascertained by legal process." *Burton* v. *Wheeler*, 217.

6. *Held*, that the mortgage and the deed being executed at the same time, must be construed together. *Ibid.*

7. *Held*, further, that collection by legal process referred only to a judgment and execution at law and that the party was not bound to resort to a Court of Equity, to remove any impediments to a satisfaction of a judgment and execution at law, such as fraudulent conveyances, or the like. *Ibid.*

8. Where a party executes a deed, knowing it to be absolute, it must be held to be absolute, unless strong and clear proof can be adduced of mistake or imposition. *Elliott* v. *Maxwell*, 246.

9. To turn an absolute deed into a mortgage, on the ground of inadequacy of price, the price must be grossly inadequate. *Ibid.*

10. The time fixed in a statute as a bar to the redemption, in the case of an express mortgage, specifying a day for forfeiture, must also be applied to a right of redemption, arising by construction of a Court of Equity, and the time must be computed from the accruing of the right to sue. *Bailey* v. *Carter* 282.

11. The principles in relation to dealings between trustee and *cestui que trust*, as adopted by Courts of Equity, do not apply to the case of mortgagor and mortgagee Dependence and the duty of protection are not involved in this relation, and they may deal, subject only to the ordinary principles; with this difference, that the relation is a circumstance, which always creates suspicion, and aids in the proof of an allegation of oppression and undue advantage, when there is a gross inadequacy of price, and other circumstances tending to show fraud. *Chapman* v. *Mull*, 292.

PARTIES :

1. Where a mortgagee, or one for the security of whose debt or responsibilities a deed of trust is given, dies, his personal representative is an indispensable party to a bill for the foreclosure of the mortgage or the execution of the trust. *Vanhorn* v. *Duckworth*, 261.

2. The principle of equity in respect to parties, is, that all persons interested in the subject of a suit, ought to be before the Court, so as to be concluded by the adjudication, and thus will be avoided the vexation and expense of further litigation of the same matter, by an omitted party in interest *Ibid.*

3. A Court of Equity can no more dispense with proper parties to a case than a Court of Law can; nor can the fact of there being no person qualified to prosecute a legal claim before a legal tribunal, transform the case into an equitable one, and thereby give jurisdiction to a Court of Equity. *Davidson* v. *Potts*, 272

PARTNERSHIP :

1. Where A and B., as co partners, give a note to C., and afterwards the co-partnership of A. and B. was dissolved, B. agreeing to pay all the debts, and a co partnership was then formed between B. and C., *Held*, that this did not operate as an extinguishment of the note, unless it was so expressly agreed between B and C. at the time their co-partnership

was formed, although it is alleged in the bill, that this note was to form a part of C.'s stock in the firm. *Mitchell* v. *Dobson*, 34.

2. Where two co-partners give a bond to a third person, as between themselves, each is considered in equity as surety for the other, and, as such, is regarded as a creditor and has a right to all his privileges as one. *Mosteller* v. *Bost*, 39.

3. If A., one of the co-partners, becomes insolvent, and B., the other partner, has to pay a debt from the firm, B. has an equitable lien upon the bond, which he had given to A. before the commencement of the co-partnership, and if A. assigns this bond to another person, the assignee is liable to the same equity, which B. had against A. *Ibid.*

PARTITION :

1. A decree had been made for a sale of land for partition, the land had been sold and the money ordered to be distributed among the tenants in common. A portion of the money not having been paid out, one of the tenants petitioned to be reimbursed out of that portion, for certain taxes he had paid on the land. *Held*, that the Court could make no such order, because it would be contrary to the order previously made for distribution. *Lewis, ex parte*, 4.

2. The right of a tenant in common to partition of a legal estate, is as absolute in a Court of Equity as in a Court of Law. The Courts having concurrent jurisdiction, as to an actual partition, must adjudicate on the same principles. *Donnell* v. *Mateer*, 94.

3. In the case of a petition at law for an actual partition, if the defendant wished to avail himself of an equitable defence, as, for instance, a claim under a contract for purchase, he must obtain an injunction to stay proceedings at law, until the cause can be heard in equity. *Ibid.*

4. If the application for partiton be to a Court of Equity it is not sufficient for the defendant to rely upon his equitable grounds of defence in his answer. He ought, to entitle himself to his equity, to file a cross bill, for which the Court would allow him a reasonable time; but his failure to do so will not prevent him from filing a separate bill for relief, as the partition affects the legal title only, and the share, assigned in severalty, could still be reached. *Ibid.*

PRACTICE AND PLEADING :

1. A clerk and master is not entitled to any specific fee for issuing a subpœna for a witness to appear before him to give his deposition. For such service he is to be compensated as the Court may think proper. *Stokes* v. *Brown*, 33.

2. Where an injunction has been dissolved and the money has been collected by an execution at law, and paid into the Court of Law, the Court of Equity will, upon proper affidavits, direct the money to be paid into the office of the Clerk and Master of the Court of Equity; and where the interests of the plaintiffs at law are several, the Court will direct, that the parts belonging to those who are insolvent or removed out of the State, shall not be paid to them until they have given bond and security respectively; that they will

refund the money, if the Court of Equity shall ultimately make a decree in favor of the plaintiffs in equity. And if the said bonds shall not be given after due notice, the Clerk and Master of the Court of Equity shall lend out the money upon bond and good security, to be subject to the future orders of the Court of Equity. *McDowell* v. *Simms*, 50.

3. On a demurrer to a bill a defendant is not confined to the causes of demurrer assigned in it, but may insist *ore tenus* on others. *Vanhorn* v. *Buckworth*, 261.

PRINCIPAL AND AGENT :

1. An agent, who renders no account, is entitled to no compensation for his services, nor is he entitled to charge for the particular payments made for his principal, without showing that, upon a settlement of the transactions of his agency such an amount is due to him. *Motley* v. *Motley*, 211.

2. The principle is well settled, that if an agent or trustee convert the property confided to him, the principal or *cestui que trust* may, at his election, ratify the transaction, and claim whatever profit is made by it. *Ibid.*

SPECIFIC PERFORMANCE :

1. When, in a contract for the conveyance of land, the land is described as "lying on the southwest side of Black River, adjoining the lands of William Hoffard and Martial:" *Held*, that the description was sufficiently certain to entitle the bargainee to a specific performance of the contract. *Kitchen* v. *Herring*, 190.

2. Though it appear that the land contracted for is chiefly valuable on account of the timber, yet equity will decree a specific performance. *Ibid.*

3. The principal of specific performance is adopted, not because the land is fertile or rich in minerals, or valuable for timber, but because it is land—a favorite and favored subject in England, and in every country of Anglo-Saxon origin. *Ibid.*

4. A. made a parol contract for the purchase of land from B., for which he paid by delivering a horse, and also a bond on one M., which he caused to be made payable to B. M. died insolvent, the bond remaining uncollected. *Held*, on a bill for specific performance or compensation, to which B. pleaded the statute against parol contracts for land, that A. was entitled to compensation; that so far as related to the horse, if that had been the only subject of controversy, A. would have had no relief in equity, as he could have had complete redress at law, upon the recision of the contract; but as he had no redress as to the bond, the Court would entertain jurisdiction as to that matter; and, thus taking jurisdiction as to part of the case, would take jurisdiction of the whole, and grant the relief prayed for. *Chambers* v. *Massey*, 286.

TRUSTEES :

1. Under some circumstances a trustee, although restricted to the expenditure of the profits of the trust property, may be at liberty to anticipate, by spending, under an emergency, more than the profits of the current year; as if there

be a dearth and consequent failure of crops or some extraordinary sickness, making it necessary to incur heavy medical bills; but, in such case, the evidence of this emergency must be averred and proven, and a full account rendered. *Downey* v. *Bullock*, 102.

2. It is an inflexible rule that, when a trustee buys at his own sale, even if he gives a fair price, the *cestui que trust* has his election to treat that sale as a nullity, not because there is, but because there may be, fraud. *Brothers* v. *Brothers*, 150.

3. Dealings between a trustee and a *cestui que trust*, in reference to the trust fund, are not prohibited; but are watched in this Court with great jealousy, and the trustee is required to show affirmatively, that the dealings were fair and for a reasonable consideraiton, so as to exclude all suspicion that any advantage was taken of the influence which the relation in most cases creates. *Allen* v. *Bryant*, 276.

VENDOR AND VENDEE :

1. A vendor who has parted with his title to land, has no equitable lien on the land for the purchase money. *Cameron* v. *Mason*, 180.

2. Where it appeared that, upon a treaty for the sale of a tract of land, quantity entered essentially into the treaty, and the parties meant to contract for the land, as containing a certain quantity, and not as supposed to contain it or thereabouts; and it turns out that the deed, executed in pursuance of this treaty, conveys more or less than the quantity believed to exist, a Court of Equity, though there be no fraud, ought to relieve either party, upon the ground of surprise and mistake of both parties. *Pharr* v. *Russell*, 222.

3. A purchaser, when he discovers that a fraud has been practised on him, or that the other party has, by his conduct, prevented him from enjoying the fruits of his purchase, must, to entitle himself to relief in a Court of Equity, immediately give notice to the vendor that he will no longer be bound by his contract, but will rescind it. *Alexander* v. *Utley*, 242.

WIDOW :

1. Before the assignment of dower, a widow is not seized of any portion of the real estate of her husband, and cannot, therefore, convey any title at law to it. She, can, however, make such a contract concerning it, as equity can and will, under certain circumstances, enforce. *Potter* v. *Everett*, 152.

2. When a widow has dower assigned to her in a tract of land, the revision of which is divided among several different reversioners, she has in general a discretionary right to get wood for repairs, fire wood, &c., from what part of the land she pleases. But, it seems, that, in an extreme case, where the widow acts out of mere caprice and partiality, with a view to favor one at the expense of the other, a Court of Equity might be induced to interfere. *Dalton* v. *Dalton*, 197.

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